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THE FOUNDATIONS OF CONSTITUTIONALISM

by *Harvey Wheeler**

I. INTRODUCTION: THE MYSTIQUE OF CONSTITUTIONALISM

During the 1970's the principles of constitutionalism attracted renewed attention as a result of the constitutional crisis that came to a head during the Nixon Administration. Reform proposals varied from the nationalization of the party system to devices for revitalizing the checks and balances mechanism that had ceased to function as planned by its 18th century designers. The proposal most frequently offered was to limit the power of the presidency and enhance that of Congress. But all such proposals make the implicit assumption that the 18th century constitutionalizing impulse that produced our tripartite system of checked and balanced governmental functions embodies the enduring essence of constitutionalism. But even if one grants the initial adequacy for America of the checks and balances system, it never worked well elsewhere. What if it should turn out that our original checks and balances system was appropriate only under special historical and social conditions? The contemporary need to revitalize constitutionalism would then dictate quite different reforms.

This essay argues that the theory of constitutionalism, as revealed through its anthropological and historical origins, proves that our original checks and balances system was appropriate only under special historical and social conditions. Specifically, the principles that underlay the provisions adopted by the designers of our Constitution were essentially those that they had inherited from 17th century England; the particular institutional arrangements that they devised resulted from their efforts to decolonize and republicanize England's "Glorious" Whig revolution. That their ingenious institutional devices are no longer adequate today should come as no surprise. But the proof for this statement is not, as with some propositions, intuitively self-evident. In part, this is because the very idea of constitutionalism is somewhat mysterious. Some of the responsibility for this can be attributed to the obscurity with which the topic has been treated by those who have writ-

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ten about it. But it is also due to the fact that there is something mysterious about its ingredients: law and government—government because it furnishes a practical exemplification of the philosophic proposition that the whole is greater than the sum of its parts; law because its effort, and sometimes its result, is to bring social order and political stability out of chaos.

But constitutionalism stands for an even greater mystery. It purports to guarantee that these attributes of law and government will be achieved in accordance with the "rule of law," that it will be directed to the realization of the common good, and that all this is to be accomplished through collective efforts of ordinary people, even though as individuals they might act only from selfish and private motives. In short, the mystique of constitutionalism holds that democracy and the rule of law—the former derived from the institutionalization of medieval civil disobedience—can be made supreme through a special combination of electoral and governmental institutions. Drafting a constitution was the art of achieving these twin aims. The 18th century expositors of constitutionalism tended to convey the impression that constitution-making was a branch of science, not unlike Newtonian celestial mechanics, and that if one utilized the proper structural principles in making a constitution, the result would, almost automatically, produce freedom and justice.¹ This was the political counterpart of the self-regulating mechanism that was then thought to govern the price system in free markets, even if people abandoned themselves to private vices. So ran the constitutional mystique that inhered in the special 18th century institutional devices designed to harness intrinsic human power drives to the democratic production of the public good.

In recent times constitutionalism appears to have lost these mysterious self-regulative powers, and the family of its adherents has suffered a grievous decline. As the number of constitutional democracies diminished, the departing members seemed to abandon it roughly in the order of their initial adoption. France virtually discarded constitutional democracy under De Gaulle. Italy was close behind. Only a few of Britain's imperial progeny remain among the faithful, and even with them the picture is spotty. South Africa has had a quasi-fascist regime for some time. Pakistan has a dictatorship. India is a doubtful member of the family. The prospects for the two Irelands are not bright. Only Canada, Australia, New Zealand and the United States

1. A. LOVEJOY, *The Theory of Human Nature in the American Constitution and the Method of Counterpoise*, in *REFLECTIONS ON HUMAN NATURE* 35 (1961).

seem steadfast, and even for this latter group, as with Britain herself, the situation is becoming ever more precarious.

Outside the English speaking world there are West Germany and the European marcher states, such as Switzerland, Holland, and Belgium. Beyond these lie Scandinavia and possibly Israel, but there the situation is something like that of India. On the periphery are Japan, Tanzania and a scattering of others such as Malta, followed by a few potential converts like Yugoslavia and Mexico. This list is not exhaustive, but it does give an idea of the range of the various regimes that can still in some way be associated with constitutional democracy. The list is also instructive, for a rapid perusal suffices to underscore the perilous position constitutional democracy now occupies in the world.

While the low point does not yet appear to have been reached, the zenith can be located during the 1920's in the democratic reconstruction period that followed World War I. That was also the finest hour for the political philosophy of constitutionalism. Constitutionalism was then thought of as the structural theory scholars abstracted from the working principles of the most effective of the constitutional democracies then existing.

The American political tradition has always been characterized by a predilection for discussions of the nature of constitutionalism, though there was never solid agreement about just what constitutionalism meant. However, in spite of this uncertainty, Americans have always in the past been certain that regardless of what constitutionalism meant, they possessed it. Indeed, the institutional genius Americans have habitually attributed to their own political tradition has even led them to assume that constitutionalism is the exclusive property of the Anglo-American nations; or alternatively, that constitutionalism may be simply whatever the Anglo-American political systems happen to be at any given time. As crisis has spread through democracies all over the world, the search into the essential nature of constitutionalism has been resumed with a special intensity. Following Watergate, and the close brush with dictatorship it revealed, however, there is no basis for over-confidence about the chances of its preservation.

Ancient constitutionalism dealt with an all embracing state. Modern constitutionalism, however, from its birth in the 17th century, had been associated with limited government. This was so, said Charles H. McIlwain, "by definition."² It was usually concluded, during the 18th

2. C. McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 372-73 (1910) [hereinafter cited as McILWAIN].

and 19th centuries, that limited government required keeping government small and inactive. If that were the case, the new type of positive government that succeeded the great depression was incompatible with the principles of constitutionalism. The leading critics of positive government, such as Albert Venn Dicey³ and Frederick Hayek,⁴ claimed that it and constitutional government were contradictions in terms. As we shall see later the great constitutional debates of modern times were waged over this issue.

Constitutionalism also had to accommodate the changed view of the human being that began to emerge in the late 19th century as individualistic rationalism lost credibility. People were no longer thought of as the atomistic political agents our traditional constitutional morality had assumed. Immersed in identifying groups and doubtful of personal capacity of political potency, the contemporary person finds the credibility of individualistic rationalism undermined, but nonetheless demands that constitutionalism continue to guarantee the individual political values that were associated with the former inner-directed status.

The component groups that are indigenous to contemporary society are qualitatively different from the social groups prevalent in 1789. The conditions of political activity have almost reversed themselves from the time of James Madison, when the politically significant components of the nation were the states. Virginia and Massachusetts were prime examples. They were territorially, socially and economically autonomous. Possessed of such coherence, they produced, on the national level, "factions" whose members were convinced that the values they saw confirmed in their own regional environments should be generalized for all of society.

Early America's state-born factions were not single-purpose pressure groups occupying a restricted segment of society, such as we now think of when we consider contemporary political forces such as unions and corporations. Rather, they were a series of general purpose units. The two most powerful ones were the nascent manufacturing society of the north and the southern planter society. Each made exclusive bids for total power. Under such conditions the problem of politics, as James Madison saw, was first to enlarge the size of the polity to encompass the entire nation and then politically dissociate their indig-

3. A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1889) [hereinafter cited as DICEY].

4. F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); F. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* (1944).

enous components through a system of atomizing representative devices which, after breaking through the homogeneity of the individual states, might facilitate the achievement of general society-wide decisions in Congress.

Our times face a different problem. It is to devise a politics for a society that has witnessed the disintegration of the wholistic territorial groupings that worried Madison. First came the development of groupings such as unions, corporations and professions, and then followed their informal amalgamation into a techno-organizational Establishment. The component parts can see no further than the politics of self-interest; an informal amalgam—Dwight Eisenhower christened it the military-industrial complex—that sees politics as the struggle for power and control. To have claimed in the late 19th century that what was good for Virginia was good for the nation might have been untrue, but it was plausible. To claim in the mid-20th century that what is good for General Motors is good for the nation is patently false.

The conceptions associated with constitutionalism have remained constant, but their referents have shifted to such an extent that the old constitutionalizing techniques no longer suffice. Politics is eternally concerned with the achievement of unity from diversity, but the components are now qualitatively different from those of the 18th century and the forces of disunity much more noxious. Nineteenth century German sociologists foresaw something like what has happened in America when they described the transition from organizations based upon natural communities to those based upon legal association.⁵ Under such conditions constitutionalism must also change. Madison's theory that salvation lies in the numerousness of "factions" is no longer applicable. On the contrary, we are progressively persuaded that rather it is our destruction that is implied by the growth of our modern indigenous techno-organizational associations. One problem facing 20th century constitutionalism is to adjust its aims to cope with a society in which the individual has little political significance except as the member of a monstrous techno-organizational group; a society which in the process of pressing its characteristic drive for power and control upon its members has left them desensitized with regard to the common aims and general interests that a proper constitutional order ought to elicit from its citizens.

5. See A. GIDDENS, *CAPITALISM AND MODERN SOCIAL THEORY: AN ANALYSIS OF THE WRITINGS OF MARX, DURKHEIM AND MAX WEBER* (1971).

Constitutionalism is often distinguished from dictatorship, but even dictatorships possess some characteristics of constitutionalism on a restricted scale. Indeed, when the sphere of politics is confined to the relationships between the members of a ruling class, all regimes are to some extent constitutional. This is little more than a tautology; a generalization from the fact that one way of describing the members of a ruling class is those whose exercise of political power cannot easily be withdrawn from them without threatening the stability of the society as a whole. Gaetano Mosca described how this happens when ruling classes surround themselves with self-protective "juridical defenses."⁶ In order to defend their prerogatives, ruling classes institute rule-of-law protections, and in order to stabilize their regimes, such protections are extended to a broadening social base. From this point of view, a study of comparative constitutionalism would begin with a sociological description of the ruling establishments of the societies in question. Constitutional *democracy* would judge these societies on the basis of two criteria: (1) the size of the fraction of the whole of these people who could be said to participate in political power, and (2) the extent to which those people were truly representative of the society's indigenous social and power groupings. And this is, in effect, the way scholars typically study comparative constitutionalism. However, there is still something missing.

We know that the constitution of each country reflects in some sense the broad sociological configurations of its people. But beyond this, it also seems true that in some countries the constitution is able to serve as a kind of democratic magnifier of civic wisdom; able somehow to produce the actual effects of greater democracy and deeper wisdom than seems practically possible in modern society. The formal properties of the democratic constitution of the French Third Republic were not markedly different from those of British democracy, yet the British always seemed able to maintain a larger degree of political wisdom than was possible in France. Political scientists lamely attributed this to the superior constitutional morality of the British, as if a constitutional multiplier effect was somehow able to operate in England. But when we try to come closer to understanding just how this magnifying action works—when it does so—we find constitutionalism to be an extremely elusive concept.

Usually, the attempt to identify how this so-called magnification of

6. G. MOSCA, *THE RULING CLASS* 100, 120, 126-52, 228-29, 469-70, 475 (H. Kahn transl. 1939) [hereinafter cited as Mosca].

democratic civic wisdom is brought about by some constitutions and not by others has been a taxonomic effort, like that applied by Aristotle to the study of governmental forms. Such a study might yield a general theory of governmental forms. Upon completing such a study, one might be able to give an abstract answer to the question, "What is a constitution?" But this would not be the same as answering the question, "What is constitutionalism?" A taxonomic analysis of the constitutions of Britain, France, Germany and Italy during the mid-1920's reveals only miniscule differences between them. But scholars nonetheless are almost unanimous in judging that only Britain exhibited the principles of constitutionalism.

Again, to speak of constitutionalizing something—the military, the secret police, education or science—means more than merely providing for them through supportive governmental agencies: to nationalize and to constitutionalize are not synonymous. On the contrary, the military, the secret police, or the presidency may be "nationalized" and still function as a despotic threat in society. Such a threat leads to the demand for constitutionalization—seeing that they function according to the principles of constitutionalism. Constitutionalism, among other things, attempts to elicit, protect and magnify the application of democratic civic wisdom to the problems of government.

This feature distinguishes the theory of constitutionalism from general political theory. The latter has been the staple of political philosophy since Plato. The former came into its own only after the democratic revolutions that began in the 17th century. The democratic feature, which will be discussed later as the "institutionalization of civil disobedience,"⁷ made the basic difference and also complicated the problem. Modern constitutionalism attempted to solve the problem of making government at once popular and proper. The task is better stated in reverse: to prevent despotism and inhibit corruption, while at the same time governing effectively. Of course, this was easier for the first liberal constitutional democracies to accomplish than it is for today's bureaucratic monoliths. They were able to reduce to a minimum what government did. The Americans did this and then devised an intricate governmental mechanism which was powered by the forces of democracy and yet controlled by a series of self-activating inhibitory governmental mechanisms. The design specifications for the 1789 Constitution, in effect, called for an automatic peace, freedom, justice and order machine. After a few minor adjustments of the feed-back

7. See pt. III *infra*.

mechanisms, it very nearly—or at least more nearly than any other—came up to the design specifications. This near automaticity made it the marvel of the world, and it was the feature that so stubbornly eluded other constitutional designers and contributed to the mystique of modern constitutionalism. It is also the feature that no longer works.

In the 18th century, constitutional automaticity was expressed in terms of classical mechanics; nowadays it is described in terms of feedback mechanisms. Indeed, the initial checks and balances system of the United States Constitution lends itself quite well to exposition according to the principles of information theory. However, one of its ingredients is the rule of law, and a much more primitive feedback system generated *its* characteristic doctrines and practices. The rule of law is the first of constitutionalism's twin ingredients to require exploration. This will be done through an anthropological and historical investigation of the institutional roots from which the rule of law developed. Following that the English historical foundations of constitutionalism's democratic component—the institutionalization of civil disobedience—will be explored. Next, a critical evaluation of modern theories of constitutionalism will permit drawing some final conclusions about solutions to the contemporary constitutional crisis.

II. THE INVENTION OF THE RULE OF LAW

A. *Introduction*

A law of physical nature purports to state an invariable relationship between material components of the environment. An example is the law of the rate of acceleration of falling bodies. But "Natural Law" refers to human beings. It purports to state a relationship that ought to hold between human beings if they are to provide themselves with optimum benefits and enjoyments. According to Natural Law doctrine, a Natural Law may not "exist" or actually ever have been followed by any human being, but nonetheless it may be called "true." It is said to be "true" and applicable to all human beings because it can be discovered by human reason, and wherever it is followed, its alleged benefits will be enjoyed.

A famous example of a Natural Law is the maxim: "*pacta servanda sunt*" (contracts must be kept). This Natural Law proposition can be read as stating that implicit in the existence of human society at however primitive a level is the keeping of agreements and contracts. It is impossible to imagine human society without this principle, though

the principle may be more or less extensively applied, and it may be well or ill observed. The members of a society may not realize that the keeping of contracts is implicit in their having a society at all—it is not necessary that a society know it is following a Natural Law in order to benefit from it. It is not necessary to the theoretical existence of Natural Law that anyone ever discover it. Natural Law “exists” in the form of rules implicit in the natures of men individually and collectively. Natural Law is like an axiom of geometry in one sense: it cannot be repealed, but it can be ignored.

Natural Law is not a rule of morals. Morality tells us the nature of good and bad. Natural Law is often given moral content, but this is not a necessary part of Natural Law. *Pacta servanda sunt* can be interpreted as carrying moral obligation, but it also can be interpreted as carrying no more than functional obligation: one of the minimum functional prerequisites to having human society. Hans Kelsen used this principle as the basis for working out a general theory of law which carried only non-ethical obligation.⁸

Natural Law is not a folkway. A society may have many customs and folkways which carry only local or temporal significance. It may be the custom that whenever someone fails to keep an agreement, he can be challenged to a duel by the aggrieved party. The folkway providing for private enforcement through dueling is a local arrangement, but enforcement of the obligation of contract is a feature applicable to human society in general.

The suggestion that there is such a thing as functional, as distinct from moral, obligation raises some serious philosophical problems. Since the time of Hume and Kant it has been generally assumed that there can be no valid way of deriving obligation from facts. Hume concluded there is no obligation implicit in any facts.⁹ This famous argument by Hume appeared to completely discredit teleology and Natural Law. Nor was such a demonstration unexpected. Teleological approaches to physical and social events had been under devastating attack from scientists and empiricists for over a hundred years. Hume’s demonstrations merely rationalized what might be called the “ideology” of the physical science approach to the interpretation of empirical data. Kantian phenomenology appeared to clothe Hume’s propositions with logical unassailability.¹⁰

8. H. KELSEN, *PURE THEORY OF LAW* (M. Knight transl. 1967).

9. D. HUME, *MORAL AND POLITICAL PHILOSOPHY* 33 (H. Aiken ed. 1948) [hereinafter cited as HUME].

10. G. SABINE, *A HISTORY OF POLITICAL THEORY* 605 (1937).

The interesting thing is that when Hume himself wrote about political theory, he ignored the strictures about fact, value and reason contained in his philosophical writings, and properly so. Moral duties, said Hume, carry obligation because of the "necessities of human society"¹¹ and because of the impossibility of having human society "if these duties were neglected."¹²

A small degree of experience and observation suffices to teach us that society cannot possibly be maintained without the authority of the magistrates, and that this authority must soon fall into contempt where exact obedience is not paid to it. The observation of these general and obvious interests is the source of all allegiance, and of that moral obligation which we attribute to it. If the reason be asked of that obedience, which we are bound to pay to government, I readily answer. Because society could not otherwise subsist.¹³

Hume's ethics are clearly functional. Its authority derives from the nature of things—Montesquieu's "necessary relations of things."¹⁴ In short, Hume used logic to derive value from fact, and he did so with considerable validity. But it was only possible for his conclusions to be valid because human beings had also done in practice what he had done in theory. Both human beings and Hume could do this because cultural "facts" are qualitatively different from physical "facts"; they contain certain types of values at their core. An exploration of how beings discover and utilize these values will help us derive the process through which first, Natural Law, and then the rule of law, was invented.

B. *An Anthropology of Natural Law*

Anthropologists have taught us that primitives are not "child-like" adults and that primitive cultures do not contain built-in teleological developmental or evolutionary patterns which determine them to grow from simple to more complex cultural forms. Moreover, if cultural transitions do take place in primitive cultures, there is no basis for assuming that one specific new cultural form must always develop out of a given simpler form. In particular, there is no reason for assuming that because primitive Greek culture developed into a quite sophisti-

11. HUME, *supra* note 9, at 367.

12. *Id.*

13. *Id.*

14. This famous statement is the opening sentence of C. MONTESQUIEU, *L'ESPRIT DES LOIS* (T. Nugent transl. 1949). The discussion by E. DURKHEIM, MONTESQUIEU AND ROSSEAU: FORERUNNERS OF SOCIOLOGY 36 (1960), remains the best treatment of this concept.

cated civilization in a specific evolutionary pattern, any other primitive culture would ever experience the same development. We may use evidence drawn from Greek experience, but we may not imply that human nature in general or any other social system in particular must follow the same pattern. However, the fact that the Greeks did exploit their own specific developmental pattern holds important lessons for us. It happens, however, that in the case of the Greeks we are able to uncover a useful structural explanation of their development of natural law and idealism.

An animistic world view is found in many sophisticated as well as many primitive cultures. In such a view, all things exhibit principles of life and will. Each thing in the world, including the world itself, may contain a "soul," even though there may be distinctions between the sacred and the profane. Nothing is inanimate or lifeless. There is no death in the world in the modern Western sense of death, for that notion of death meant the conversion of something animate into something inanimate. In an animistic culture death may be terrifying, but it is also a transition to another form of "life."

Until the 17th century, the official world of the West was animistic. It was only with the ascendancy of modern physical science that animism was excluded from specified realms of existence and material things were no longer regarded as containing souls within themselves. The physical universe as described by science no longer exhibited will, either its own or God's. It was regarded as being explainable without regard to any spiritual or external principle of causation; causation could be explained on the basis of relationships intrinsic to the system under observation. However, the development of inanimate scientific relationships took place in a direct progression out of animate, quasi-magical relationships. Astrology was a very sophisticated way of studying and measuring the motions of heavenly bodies. It attained great mathematical sophistication and great predictive power, while still within the realm of magical explanation and magical assumptions about the connection between happenings in the macrocosmos and the microcosmos. The transition from astrology to astronomy, from alchemy to chemistry and from Paracelsan magical medicine to scientific medicine are only three of the most prominent instances of transitions from magical animistic systems to scientific inanimate systems.

But medieval animism itself was already a sophisticated approach, and it developed out of anthropomorphic precursors in much the same

way that it gave way to scientific successors. Anthropomorphism is a form of animism in which the things of the world are visualized and thought about as if they had not only souls but also manlike personalities. The religions and the cosmologies of Greece and Rome were both animistic and anthropomorphic. Their gods and goddesses symbolized departments of nature such as rivers, forests, agriculture, and heavenly bodies, as well as the arts, sciences and virtues. Anthropomorphism is itself a highly rationalized and "scientific" approach for it permits connecting together observed occurrences from some area of experience into a coherent narrative with great explanatory power.

The moon in a non-anthropomorphic culture may be the object of mystery and fetishistic magic, but little can be made out of it unless there is some symbolic idiom through which its phases and motions can be connected together and also connected to other events which seem to be related to the moon. But once the moon is "seen" in anthropomorphic terms, a very complex "science" of the moon can be developed. The story of the moon can be told in terms of human and super-human biographical events. The Greeks and Romans developed a marvelously intricate myth-science for all departments of human experience on the basis of anthropomorphic myths.

Although anthropomorphic "science" has very low efficacy when compared to the inanimate sciences of the modern West, it is nonetheless extremely efficacious. Quite complex and sophisticated civilizations can be built on anthropomorphic foundations. However, there is one great difference between anthropomorphic and inanimate sciences. Anthropomorphic sciences are basically "political" sciences. The relationships between men and the universe, and the relationships between parts of the universe, are seen and interpreted in nearly the same terms as are the relationships that men have with each other.

Inanimate science can be used to *manipulate* "things" which have no wills of their own and are unable to prevent the manipulation from taking place. Anthropomorphic science can be used to *influence* living man-like gods who have wills of their own and might, but for the system of power relationships and influences in which they exist, do something quite different and willful. We may guess some of the reasons that pre-urban Greeks came to visualize the events they experienced in political terms.

Pre-urban Greeks were highly integrated into their cultural order. Even though with them, as with many primitive peoples, various cults were monopolized by different families and secret societies, there was

very little that was kept from each member of the society. Religion was an elaborately social process, requiring the participation of every member. The fundamental myths belonged to the society as a whole and were shared by every member. The system of rules and roles followed by the society was assimilated thoroughly by each member as he was ritually initiated through his various life stages.

Though there was specialization of labor, even at very primitive levels no technology was so completely intellectualized that it could not be understood by each member. Others might have been more skilled at house making, boat making, weapon making, or hunting than any ordinary member; nonetheless, each member understood all of these other functions, saw how they fitted into the function of the society, and thereby was integrated into his culture and felt at one with it. In pre-urban Greek society the individual, in maturing, participated in almost every phase of his culture, appreciated the significance of its "science" and, through his own participation in it, assimilated his culture, integrating it as he integrated himself with its goals.

It is slightly different, however, with the area that we in modern times have distinguished as the inanimate physical environment. What we call the physical environment seems more chaotic and terroristic to pre-urban people than it does to Western man. In their anthropomorphic and demonological myths and in their animistic magic, pre-urban people in general picture the physical universe as a vast and frightening animated arena featuring the willful struggles of titanic forces. Without making our rigid separation between cultural and physical universes, they nonetheless see the two as exhibiting slightly different manifestations of the same governing forces. What appears in modern science as an ordered physical universe appears to pre-urban man as a multi-form and even chaotic struggle whose outcome is in doubt from moment to moment.

Being highly integrated into their social order but disoriented toward the physical universe, primitive men often react with a kind of reverse positivism and project into the terroristic and hostile physical environment "political" and "lawful" elements similar to those they see at work in their social system.¹⁵ The resulting anthropomorphic or "demonological" cosmology accounts for otherwise nonunderstandable events.¹⁶

15. "On first looking upon the external world, man pictured it to himself as a sort of confused republic, where rival forces made war upon each other." NUMA DENIS FUSTEL DE COULANGES, *THE ANCIENT CITY* 121 (1956).

16. See W. LA BARRE, *THE GHOST DANCE: ORIGINS OF RELIGION* 31-68 (1970).

Pre-urban Greek cosmology "politicized" the physical universe through a mythology that explained how original cosmic rulers brought order out of chaos.

Such anthropomorphic cosmic rulers were approached in the same way as were earthly rulers. One had to learn how to earn their favor, how to propitiate the great demons who wielded power throughout the universe.

[T]he structure and behavior of the world were held to be continuous with—a mere extension or projection of—the structure and behavior of human society. The human group and the departments of Nature surrounding it were unified in one solid fabric or *moirai*—one comprehensive system of custom and taboo. The divisions of Nature were limited by moral boundaries, because they were actually the same as the divisions of society.¹⁷

Politicized cosmic demonology may occur when men are well oriented toward their social system but disoriented toward their physical universe.

It is by no means the case that the process being described here occurred only in Ancient Athens. On the contrary, Mircea Eliade has documented its universality.¹⁸ Paul Wheatly has found remarkable evidence of a similar process at work in ancient China.

The collective memory of traditional society is by no means unresponsive to happenings in the past but, unable to retain individual persons and specific events, transforms them respectively into archetypes and categories, heroes and heroic situations. And because myth is the ultimate, not the primal stage, in the creation of these archetypes, it is often hazardous to attempt to reverse the process and to isolate the paradigm at the core of the legend¹⁹

Wheatley argues that ancient Chinese cities, like those of the ancient Mediterranean world, were constructed as a sacred precinct, a residence of the gods, and an *axis mundi*.²⁰

Anthropomorphism is the name we give to man's tendency to "create" nature, God and heaven in his own image; and the evidence for this tendency is copious, especially in the case of the Greeks. Durkheim treated all religion as an expression of man's collective needs, and following his suggestion, many brilliant interpretations of

17. F. CORNFORD, *FROM RELIGION TO PHILOSOPHY* 55 (1957) [hereinafter cited as *RELIGION TO PHILOSOPHY*].

18. M. ELIADE, *COSMOS AND HISTORY: THE MYTH OF THE ETERNAL RETURN* (1959).

19. P. WHEATLEY, *THE PIVOT OF THE FOUR QUARTERS* xv (1971).

20. *Id.* at 481.

primitive cosmologies and religions have been made. But the collective representations of cultural needs are not made in a random fashion. The "world" of Odysseus, according to M. I. Finley, portrayed the functional ethic of 8th century Greece,²¹ but it portrayed the ethic that was characteristic of heroic models whose actions were also shaped by the fact that they were derived from more primitive rituals. Moreover, the heavenly images were constructed in a special way. Olympianism was monarchical deism, but it was not a simple mirror image of the everyday institutions and practices of the Greeks reflected into the heavens. It is not possible to tell the story of the heavens in earthy terms maintaining in that story all of the variability, randomness, and accident that actually occur daily in the culture. Merely to retell the story of some event requires the storyteller to eliminate some of the multifarious happenings which were contemporaneous with that event in order to portray the particular event in question rather than several others. The storyteller must abstract a certain sequence of happenings out of their web of cultural connectedness, whether or not he is aware of going through an abstraction process. This abstraction process is even more evident when a culture builds itself a heaven. Longfellow, in *The Song of Hiawatha*, provides us with a quaint illustration of the process involved.

Hiawatha: saw the moon rise from the water
 Rippling, rounding from the water,
 Saw the flecks and shadows on it,
 Whispered, "What is that, Nokomis?"
 And the good Nokomis answered:
 "Once a warrior, very angry,
 Seized his grandmother, and threw her
 Up into the sky at midnight;
 Right against the moon he threw her;
 'Tis her body that you see there."²²

This poetic description illustrates the human abstraction process at its most elementary level. The moon may have previously "existed" as something mysterious and magical. But so long as it "existed" unqualified and undifferentiated, the culture could make little of it. However, the angry warrior "projects" his grandmother into the heavens, superimposing her on the "moon." The moon is now no longer merely something anonymously magical and mysterious. Now it is alive in the sense that a woman is alive. Now the moon "is" a wo-

21. M. FINLEY, *THE WORLD OF ODYSSEUS* 114-54 (1954).

22. 2 LONGFELLOW'S POETICAL WORKS 135 (1886).

man—a white goddess,²³ perhaps. Now the “story” of the moon can be told, for the story of the moon is the biography of a woman-like heavenly person. Movements of the moon which were previously unintelligible now become events of the life of a person. Relationships between the moon goddess and the sun god can be told in human terms. The moon’s phases, its connection with the tides, its connection with the seasons, with fertility and with the female menstrual cycle can all be woven together into a novelistic tale: the myth of the moon goddess. As more and more heavenly events are incorporated into the anthropomorphic biography of the moon goddess and her reign, the result is a more and more complex “science.” This science may be meticulously accurate from a mathematical standpoint and yet retain its portion of magic. This was true of astrology. As the study of heavenly relationships becomes more and more exact, it may find itself depending less and less on the anthropomorphic and magical framework through which the science was given birth. The transition to astronomy as the study of self-contained relationships becomes possible. But the ability to make the abstractions depended upon the original projection of an anthropomorphic rationale onto heavenly occurrences. The moon and its motions and relationships could not be “seen” until “she” could be seen in the imagery of a white goddess. This projected imagery enabled us to rationalize and systematize lunar events. These events could only then be separated from—abstracted from—the imagery (white goddess) which made them possible. Myth, astrology and astronomy proceed from each other in successive abstraction operations. Myths are to this extent cultural mirrors or projection machines that reflect into the heavens and “store” there structural features and relationships that are familiar on earth. Once the projection has taken place the resulting picture can be seen and analyzed as a picture.

Something similar may be involved in the way an artist projects an image from his subject matter. Having projected an image—onto canvas, in marble, or in written imagery—the artist can then concentrate on the properties of the projected imagery rather than on the original subject matter from which the image was projected. The original projection maneuver is an aesthetic achievement. But once a gifted artist has made such a projection his process and his techniques can be analyzed. The steps he followed can be studied and explained. The whole process can be “scientized.” And even though the “scientific”

23. See R. GRAVES, *THE WHITE GODDESS: A HISTORICAL GRAMMAR OF POETIC MYTH* at iv (1958).

or "academic" imitators who follow a great artist may not produce great art, they can produce comparable images in a comparable fashion.

Much of the myth content of a culture is produced in the same way that artists produce their images. Homely, everyday features of the culture are projected into the heavens. This process of making the heavenly projections automatically and unconsciously achieves an "abstraction" of cultural forms in the same way that an artist's image is an abstraction from his subject matter. But as with the artist, cultural projections "utopianize," in Karl Mannheim's sense,²⁴ the cultural elements that are projected. It is not possible for the projection process to work any other way. One cannot make a myth of all of the diverse events of the culture. If the myth is to tell the story of the marriage between the moon goddess and the sun god, the courtship and family system used for the myth will be one that is "typical" for the culture, not one that is atypical. It will be a type of marriage that is possible and believable for the members of the culture which develops the myth. As it involves wondrous and magical personages, it may also be a type of marriage that is "ideal." There can also be stories of "typical" failures in a culture, and these will have their place in some of that culture's myths; but for the chief cosmological actors in the myth system it will be "ideal-typical," in Max Weber's sense,²⁵ success patterns that are chosen.

Another example of unconscious ideal-typical images is often found in dreams. There is copious evidence of this not only in psychoanalytic literature but also in ancient literature. In Homer the evidence is strong that poets of his day treated dreams as if they were objective fact without making a rigid qualitative distinction between experiences of the waking and the sleeping worlds. Eric R. Dodds suggests that early Greeks were conscious of living in two worlds—the dream and the sensible worlds—without attributing unreality to the dream imagery and myth imagery.²⁶ Hence, the Greeks were richly endowed with sources from which ideal-typical patterns could be drawn. But it is not necessary to account precisely for how ideal-typical patterns may have become unconsciously projected into the heavens. It is enough to remark on the fact of the projection. And on this fact the evidence is incontrovertible. It is also undeniable that the ideal-typical features that are projected into the heavens are taken from behavioral

24. K. MANNHEIM, *IDEOLOGY AND UTOPIA* (L. Worth & E. Shils transl. 1954).

25. M. WEBER, *ESSAYS IN SOCIOLOGY* (H. Gerth & C. Mills transl. 1946).

26. E. DODDS, *THE GREEKS AND THE IRRATIONAL* (1959).

norms and cultural forms. The order of the universe is pictured as if it operated on principles similar to those of the cultural order.

Behind the Olympian god stands "a remote power, which is both primary—older than the gods themselves—and moral. It is called *Moira*, Destiny."²⁷ *Moira* stands for the "provincial ordering of the world . . . a representation of Necessity and Justice (*Must* and *Ought*)"²⁸ *Moira* is the first stage of the projection process—an unqualified realm of obligation and necessity. Zeus is but a thinly veiled Homeric pater familias—a supernatural, ideal-typical Head of the Household. "It was natural," said Dodds, "to project on to the heavenly Father those curious mixed feelings about the human one which the child dared not acknowledge even to himself."²⁹

Jane Harrison allows us to make an extended picture of the degree of cultural projection. "[B]ehind Gaia the Mother, and above even Zeus the Father, stands always the figure of Themis."³⁰ Themis is conventional law: moral norm. It is what will later become Natural Law. Dike is closely related to the "way" or the order of the cosmos. Greek Dike to us carries some of the feeling of behavioral norm rather than scientific law, but this is because it describes the behavioral norms of an animistic universe. Dike has to do with the succession of seasons, the course of the heavens: the behavioral instincts of nature. Themis is Olympian; Dike is chthonian. Harrison made the reasonable suggestion that Themis is mother of Dike for the same reason that God is the law-giver of the universe: man wants to control events; he wants right conduct to bring prosperity.³¹ Accordingly he makes "science" the daughter of "politics." No Greek philosopher reversed this order. In making the order of the physical universe dependent upon the order of the cultural universe, the Greeks merely confirmed the overall pattern of their scientific imagery which consisted of a projection into the heavens of myth encased abstractions drawn from their own cultural order.

Hesiod, at the close of his story of Zeus, related the foundation of the heavenly order with anthropological accuracy. Hesiod tells of the "institution of a social order . . . symbolized by the obviously allegorical marriage of Zeus with Themis (law) and the birth of their children, the Seasons whose names are Good Government, Justice, and Peace, and the Fates (*Moira*), who gave to mortal men their portions of good

27. H. ROSE, *ANCIENT GREEK RELIGION* (1948).

28. *RELIGION TO PHILOSOPHY*, *supra* note 17, at 21.

29. E. DODDS, *THE GREEKS AND THE IRRATIONAL* 48 (1959).

30. J. HARRISON, *THEMIS* at xxii (1963).

31. *Id.* at 516-31.

and evil”³² “It will hardly be denied,” comments Cornford, “that we have there the divine counterpart of the installation of a new earthly king, or the annual renewal of his authority over his people and of his power over nature.”³³ In another connection Cornford had argued that philosophy inherited its notions of God and Soul from primitive religion. Philosophy also got from religion (in this projection process) the “governing conception of a certain order of Nature, variously regarded as a dominion of Destiny, of Justice, or of Law”³⁴ For this reason the reign of Necessity in the universe “is also and equally a moral rule, a kingdom of Justice.”³⁵

Quite simply, what has happened is that the Greeks projected an order into the universe that was an analogue of their own cultural order. Two things followed from this. It was an order of obligation and morality administered by gods in the same way that the earthly order of obligation and morality was administered by the earthly priest-king-pater familias—the order of the universe was a reflection of the only kind of order that was conceivable. This meant that the universe automatically became what we would call a “Natural Law” universe rather than a physical science universe. Secondly, and what is more important at the moment, having projected a Natural Law order into the universe, the nature of that kind of order could be pictured; it could be “seen” and it could be analyzed. Natural Law became visible in the heavens. This permitted, and indeed made inevitable, a second stage in the process. This second stage was the counter-projection, or feedback, of Natural Law from the heavens to the very earthly institutions from which it had been derived in the first place.

The original projection process had automatically produced idealtypical norms for the heavens. These were abstractions from the quasi-symbolic behavioral norms of the culture. The abstractions existed in the form of narrative myths relating the characteristics of Themis and Dike. The characteristics of Themis and Dike could be seen and analyzed in these myth containers, and their behavioral implications could be converted into authoritative rules applicable to human relations. Coherent with this is Cornford’s admonition that the ancient philosophers were always non-scientific. They did not seek to explain things but sought rather for “that knowledge which must direct the conduct

32. F. CORNFORD, *PRINCIPIUM SAPIENTIAE* 248 (1952) [hereinafter cited as *PRINCIPIUM SAPIENTIAE*].

33. *Id.*

34. RELIGION TO PHILOSOPHY, *supra* note 17, at 5.

35. *Id.*

of human life."³⁶ And in contemporary terms the result was a normative feedback control system.

Behind philosophy there is law and religion:

[B]ehind religion, as we now see, lies social custom—the structure and institutions of the human group. . . . *Moir*a, the supreme power in the universe, was very closely allied to *Nomos*, in the sense of constitutional order. Now it appears that *Moir*a is simply a projection, or extension, of *Nomos* from the tribal group to the elemental grouping of the cosmos. We can read a new sense into the apophthegm ascribed to Pythagoras, that "*Themis* in the realm of Zeus, and *Dike* in the world below, hold the same place and rank as *Nomos* in the cities of men; so that he who does not justly perform his appointed duty, may appear as a violator of the whole order of the universe."³⁷

Both Cornford and Pythagoras are talking about the process described above as projection and counter-projection: a feedback loop through which Natural Law was invented. A philosopher like Anaximander then moves on to a further step. For what Anaximander did was to take the old Homeric personalized controls, remove their supernatural character, eliminating Zeus and his fellow Olympians. There is still a moral order in which Justice prevails; but the will of a personal God has disappeared, giving place to natural causes and eternal motion.³⁸ Plato moves a step further when he rationalizes the entire system of order into an ideal-typical constitution which carries the authority of an absolute ethic and also the standard by which human affairs can be judged and ruled. Aristotle's "final cause" was a further extension of this process and one which led to the formal enunciation of Natural Law as an explicit doctrine. This closed the feedback loop.

The point of this discussion has been to illustrate the way in which human beings, merely as they go about the business of producing human culture, also produce Natural Law as a direct consequence. Natural Law *can* be produced because human culture is quasi-symbolic; because myth systems projected from quasi-symbolic behavioral norms exist in the form of ideal-typical abstractions from the behavioral norms, and in this form provide standards of value for the judgment of behavioral norms. The process is similar to that of the time and motion study engineer who produces standards for evaluating production workers by abstracting ideal-typical norms from his observations of actual production behavior. This is a naturalistic view of Natural Law, but

36. *PRINCIPIUM SAPIENTIAE*, *supra* note 32, at 46.

37. *RELIGION TO PHILOSOPHY*, *supra* note 17, at 54 (footnote omitted).

38. *Id.* at 41.

it is possible to take such a view because, whether or not they call it by that name, human beings produce Natural Law "naturally."

C. The Validity of Law

Natural Law carries the implication of obligation, and it has a factual foundation. The process through which man produces Natural Law disproves Hume's proposition that values cannot be derived from facts. Cultural facts simply do not exist without norms—values—built into them. This is the foundation for the ancient view of political science, as well as of constitutionalism and the "higher law." Indeed, one way of stating the conclusion of the foregoing analysis is to say that a sound political science would yield policy recommendations possessing a form similar to that of Natural Law propositions. Something like this has frequently turned up in jurisprudence.³⁹ Moreover, the procedures of the English common law, the rule of law tradition and constitutionalism have all developed in a fashion analogous to the process at work in the creation of Natural Law. For, as we shall see shortly, the same projection, counter-projection feedback process occurred. However, an important difference concerns the problem of validity.

Natural Law, as we have seen already, not only is produced naturally, but also is self-validating. This is so because although it was projected from functioning cultural institutions, its derivation from those institutions is not always apparent to the members of the culture. Natural Law and related ethical rules appear to derive their validity from God or some other transcendent principle. Because the actual political order is seen to be aiming at the realization of these God-oriented rules, the question of the validity of the political order does not arise. However, this problem does arise in the genesis of secular juridical systems. This can be seen by considering the problem of freedom under law.

There are two basic ways to interpret freedom. The first and more obvious is freedom from restraint; the second and more obscure way is systemic. The first way is the view of freedom that most accords with immediate impressions. It is the absence of anything that inhibits the individual's desire to do anything he wishes.

Systemic freedom is the result of the more sophisticated reflection that, in order to be able to do anything, it is necessary to follow or submit to the functional prerequisites for the achievement of that desire.

39. Wormuth, *The Dilemma of Jurisprudence*, 35 AM. POLITICAL SCIENCE REV. 44 (1941).

Viewing man as a creature capable of employing tools and developing powers it is possible to describe the systemic conditions under which man's tools may be employed and under which man's powers may be developed. A social system in which men can realize the maximum potentiality of tools and develop their powers to a maximum point obviously provides more freedom than would occur if each merely gratified his wants freely and without restraint. On this fact rests the perennial structuralist validity of social contract theories. Throughout most of Western history, Natural Law has been the rubric under which systemic freedom has been explained and discussed. However, a problem arose when Natural Law came to have no greater claim to allegiance than did theories analyzing the abstract properties of systemic freedom. Traditionally, Natural Law had appealed to a higher authority for its source of obligation. The ancient Stoics were the first to confront the task of demonstrating the operational validity of Natural Law for a society in which God was dead. The Stoic quest led ultimately to attempts to provide naturalistic or scientific foundations for Natural Law. This failed for two reasons. The first reason was pointed out by Hume. If cultural events are regarded as facts similar in nature to physical or material facts, we can prove that it is invalid to derive values from such facts. Here, Natural Law is confronted with the dilemma of being forced to choose between making its dictates matters of faith or rejecting the attempt to provide law with a higher ground of validity. The second reason for failure derives from the collective nature of systemic freedom. This involves the problem discussed by Plato in the first part of *The Republic*.

We distinguished the two forms of freedom on the individual level. The same distinction applies with even more force on the collective level. When systemic freedom is extended to collective rather than individual problems, it appears demonstrably true to those who "see" far into the problem of collective behavior that each individual in a social system may receive greater freedom if all persons adopt the imperatives of the system seen as a whole.

There is a simple logic by which this becomes apparent. If one makes a theoretical extension of the spacial, the long run (in time), functional (in "social space"), and the structural (organizational) consequences of any projected collective act, one sees the projected act in different ways from how the act is seen if it is considered from a static, isolated, or individualistic viewpoint. The classic example of this has to do with capital formation. A given group in a "corporation" has

the problem of deciding whether to distribute its profits or to reinvest them. At first thought it appears that each member of the group will be better off if the profits are distributed. However, on further reflection it becomes clear that only a small portion of the share of profits from each member, reinvested in capital development, will later make available to each member much larger profits than would ever be possible if all profits were distributed as they are earned. The collective acceptance of present restraints on profit enjoyment, as a precondition to the greater future enjoyments of profits, is a collective dimension of systemic freedom.

Natural Law had the virtue of revealing some of the elusive systemic dimensions of freedom, for, as we have seen, Natural Law projects the general, the long-run (in time, function, structure and space) and the collective implications of different types of human behavior. For when a society produces ideal-typical patterns of behavior for its gods and heroes, what it does is to speculate on the collective implications of various patterns of behavior when they are generalized for all persons, when the long run consequences of such patterns are projected, and when such patterns are considered from the standpoint of how well or ill they fit with the other patterns of behavior that go to make up a concatenated social system. In addition, a myth system—as a social system in operation—contains the revelation—the authoritative assurance—that the system will work. That is, it contains the lesson that a social system is more than the sum of its individuals. This “more than” element, which is the “profit” accruing to individuals for making their social system work, would not otherwise be intelligible to individuals. It would be “utopian” and impractical if it were simply described speculatively or in a treatise on political theory. Few who looked only at the literary description of the hypothetical system could perceive that it might work. But seeing it at work in a myth system induces confidence in its social workability as well as, or because of, the faith in its validity induced by an authoritative myth.

All of these achievements, which are non-rationally illustrated in myth systems, are abstractly and theoretically described in the Natural Law systems derived from them. But being tied to their mythical foundations, Natural Law systems, in common with the theological and philosophical systems that are also derived from myth systems, carry implications of universality, absoluteness and infinity. That is, the obligation possessed by Natural Law is dogmatic rather than functional; infinite rather than finite. A finite behavioral norm made universal and in-

finite is an absolute ethic. But there is no valid way of proceeding from finite particulars to infinite universals. This is the basic fallacy toward which Natural Law tends. Natural Law hides from itself its mundane cultural origins in an effort to preserve its claim to normative validity, but in doing so it sacrifices its claim to logical and theoretical validity. It is not possible to relate cultural facts into a logically valid theoretical system that will have absolute normative validity. The only validity that can be given a norm of behavior is to prove that it is the logically necessary "efficient cause," or facilitator, for a given "final cause" or goal. Prescriptive norms of behavior may have only formal, instrumental validity. This may be a sufficient ground of validity for the social theorist, but social systems are not made up of social theorists. And no social system will work unless the lowliest and least speculative members of the system are as fully persuaded of the necessity and validity of the system's behavioral norms as are the most astute social theorists. This is the problem constitutionalism must solve.

This is not a problem in simple social systems. Under extremely simple conditions there is an immediate and transparent connection between the individualistic and the systemic implications of ordinary decision-making problems. The extended implications of even such serious problems as deciding for or against war or peace can be portrayed to all in tribal councils and assemblies. Such institutions effectively reveal the alternative goals that are possible and the individual behavioral implications attached to each competing proposal or goal. The means that must be willed in order to will ends are observable and understandable to all. Primitive politics are self-validating in this operational sense as well as because it partakes of the overall validity of the universe. But once social conditions and political problems become so complex that decisions affecting all must be resolved in remote and intricate institutions, an unbridgeable gap appears between the individualist and systemic implications of an action. People are deprived of any basis for perceiving the systemic validity of the prescriptive norms required of them. Ultimately they must simply have faith in the validity of their social system. They are presented by their society with a task that must be made to appear to them to be morally right inasmuch as its systemic validity cannot be perceived. The English common law is an example of how this process can work.

D. The Unwritten Law

Historians of the English common law and of English constitution-

alism often refer to medieval English law as "folk" law. Such discussions leave the impression that there was some mystical spirit or "geist" controlling and directing English culture. Any such notion is obviously reminiscent of Natural Law and "higher" law doctrines and repugnant to those with a materialist or positivist bent. Already in the 17th century the opposition between Francis Bacon and Sir Edward Coke, the "father of the common law," turned upon this issue. Coke's theories of the common law and of the "artificial reason and judgment of law" implied a principle of sovereignty and a source of authority that was higher than that of the king.⁴⁰ Bacon gave a positivist defense of the established legal and monarchical order.⁴¹ Bacon's jurisprudence was thoroughly naturalistic; he was the first of the legal realists. Thomas Hobbes, who began his career as Bacon's secretary, extended this approach from law to the entire political order.⁴² This debate has continued down to the present day.

There is no doubt that the main outlines of the English common law system were formed during the early middle ages. England was then a primitive culture, and the common law retains yet today many marks of its primitive origins. It is called a system of "unwritten" law. Judges study precedents ferreted out of the opinions of earlier judges as they search for "the law" applicable to cases and disputes arising before them. On this basis they announce their "opinion" of how "the law" applies to the new case. Judges hand down "opinions" of the implications of the law and this permits them to render "decisions" in particular cases. But their opinion of the law was formed from earlier opinions, and these, in their turn, were of the same sort as their own—earlier "opinions" of how "the law" applied to earlier cases. Where, then, is "the law"? The answer is that it is "unwritten." No common law judge has ever written down "the law" concretely. Every common law judge who has ever existed has only written down *opinions* of how "the law" applied to particular cases. "The law" doesn't "exist" in any concrete sense and never has. It is almost inconceivable that anyone starting out to invent a legal system would have invented this one. And yet it developed in a perfectly intelligible way.

From the earliest times two of the distinctive features of the common

40. COKE'S REPORTS, pt. xii, at 65.

41. See F. BACON, THE HISTORY OF THE REIGN OF KING HENRY THE SEVENTH (F. Levy ed. 1972).

42. The bridge between Bacon's jurisprudence and Hobbes' mature political philosophy is found in T. HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND 12 (J. Cropsey ed. 1971).

law have been its jury system and its rules of evidence. Both of these developed from primitive legal practices. In preliterate England law was customary and "heroic." It was heroic in a sense common to many primitive cultures. It was best expressed by certain "cultural paragons." These were revered older men who best expressed, remembered and preserved the culture's ethic and customs. The law was preserved in their memories and it was expressed in their actions. They did not "own" the law personally; everyone owned it equally and in common. But there often arose disputes over the law and over what was right. Two parties in conflict with each other would each claim to have right on their side. That is, each would claim to be following the law. The problem was to decide which law was "the law"; which law was right. Litigants entered court each bringing with him his own laws, and the problem was to "try" the law. For this purpose jurors—culture paragons—were called to say (swear) what the law was. The general principle, which is preserved today only in constitutional law, was that "old law breaks new law," and this was another reason for having the jury composed of the older culture paragons. The problem was to find out—to "discover"—what was the "good old law" by asking the most prominent elders to say how such problems were dealt with in the old days. Although there were many distinct types of jury trials, one prominent type was devoted to resolving conflicting hypotheses about what the law was. An implicit assumption of the process was that "the law" inhered in the culture and could be discovered and applied to individual disputes by following the appropriate law discovery method. Law was not "invented" or considered to be man-made until the 17th century. Even then, Lord Coke, the "father of the common law," gave strength to the anti-Stuart faction with his historical researches purporting to prove that the old law supported their claims against the king and hence "broke" the new decrees of James I. The parliamentary party, in effect, hypostatized a constitution—a common law constitution.

During the 16th century a revolution occurred in the rules of evidence. This happened in conjunction with the transformation of the jury from a repository of knowledge about the good old laws into judges of the facts about a given dispute. For after law records and books had been in continuous existence for several generations, they were obviously more reliable repositories of information about what the old law was than were the memories of old men. At the same time the law clerks and magistrates began to acquire the status of a guild whose field of expertise was the old law. They "engrossed" and monopolized the

law and its "artificial reason," in Coke's happy phrase. They began to be able to state unaided and with confidence what previous opinions about the good old law had been.

Gradually the differences which arose among conflicting parties centered legally on what facts should be used by the law clerks and magistrates in discovering which one of the previous opinions about the good old laws was applicable to the case at hand. The reliable determination of the facts of the case was a precondition to the selection of the appropriate precedents to resolve the dispute. By helping make this determination, the jury was converted from judges of the law into judges of fact. The judge took to himself the old function of saying what law applied to the facts at issue. In doing this he searched back through the records of opinions of previous judges, comparing the facts of earlier opinions with those of the dispute at hand. He knew that there would not be an exact match between the two sets of facts. But applying the assumption that earlier opinions were not instances of the law given concretely, but rather applications of the unwritten law to earlier conditions, he was able to guess how the law would apply to the present facts. The law was never concrete. The law was never written and never fully "discovered." Rather, each judge from case to case attempted a restatement of the implications of the law for the facts at hand. The function of the common law judge was similar to that of an anthropologist studying the legal structure of a primitive culture.

The crucial maneuver lay in the implied hypothesis made by the judge and by both parties to the dispute. For they implicitly assumed that there was a "law" (in Coke's case, a "constitution") whose principles were discoverable through the evidences of it that lay embedded in the earlier precedents. However, as the resolution they sought would apply only to a specific dispute, when that resolution was found, the opinion which stated it would no more state "the law" than had the earlier opinions. It would merely resolve the dispute at hand in accordance with the dictates of the unwritten law. The fundamental law remained elusive, persisting in back of the culture, holding it up, but evading conceptual capture by any given judge.

The implicit functional theory of the common law is that it is possible to analyze any human institution such as a property system or a family system and finally, even a constitution, into the principles according to which it functions. These functional principles will exist in the form of abstract hypotheses as to what must be the behavioral norms—the common laws—of the institution: the "constitution" implicit in the

institution. This projection, feedback process was the way the ancients invented Natural Law, and it was how the English invented first common law and later constitutionalism. Through such a process any conflict arising over a society's implicit constitution can be resolved in the form of a hypothetical new behavioral norm (a judicial decision) which states the proposition (the opinion) that the functional principles underlying the society logically entail following the rule of the instant decision whenever a situation like that presently at dispute might arise. Few common law judges may have been aware of going through this rational process, but this process reveals the constitutional logic implied in their derivation of opinions from precedents. It is the juridical counterpart of the projection and counter projection feedback process that was described earlier.

The logical stages in the production of common law and, ultimately, of constitutionalism, can now be seen to be similar to the logical stages previously described for the production of Natural Law. First comes the projection of the abstract functional principles of institutions through a deliberative law-trying process. Then there is the counter-projection, or feedback, of the derived principles back on society in the form of authoritative standards of behavior. The standards of behavior, as the common law of the constitution, carry the obligation of a functional ethic stating the behavioral norms that are the logically entailed operating principles of the social system. But the true functional source of the ethic that validates the laws announced by judges is not perceived. Moreover, that ethic, though it is enforced by the state, does not appear to have been produced—to have been manufactured—by either the state or its officials. Rather, the force of constitutional law appears to derive from an ethic that, although announced by, was not invented by human beings. Constitutional law appears to express an autonomous ethic that exists as a higher law apart from politics, and being a higher law, it can furnish the source of the validity of the derivative common law opinions that are announced from time to time by judges sitting on cases and controversies. Common law judges, especially the most creative and speculative ones like Justices Coke, Marshall and Cardozo, frequently identified their most fundamental constitutional opinions with the higher law. Numerous scholars—C. H. McIlwain and E. S. Corwin are recent examples⁴³—have followed this judicial lead. F. W. Maitland avoided

43. See, e.g., E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955).

higher law assumptions by refusing to talk about constitutionalism at all. Instead, he borrowed a surrogate from Otto Gierke: the concept of the "real personality of the group."⁴⁴ This permitted him to adopt a sociological rather than a jurisprudential stance when he dealt with the trust, the corporation, the corporation sole (one person, such as a Bishop, considered to be a corporation) and the crown.⁴⁵ As we shall see later, Gierke's notion was a good lead, up to a point. It helped account for many of the historical facts about collective legal action and many arcane features of the medieval English constitution. But this advantage was purchased at the price of incorporating the mystical notions of geist and real corporate personality into the mundane functional problems of English law. Legal persons such as corporations and states can be given empirical juridical existence, that is, a "real" personality, more simply through the process previously outlined. Here we are speaking of non-individual roles of actions attributable to legal persons. This introduces a further facet of constitutionalism—the "rule of law."

E. The Rule of Law and Constitutionalism

The rule of law always has been closely allied to the notion of Natural Law. It has a very hallowed usage, reaching back beyond the Middle Ages into classical times. Plato expressed in *The Laws* one of man's eternal political quests when he wrote of the search for "the sacred and golden cord of reason, . . . the common law of the State . . ."⁴⁶ The rule of law is not the same as Natural Law, for the rule of law is said to obtain among men on earth while Natural Law is said to provide a higher foundation for the validity of the rules of human conduct. A Natural Law interpretation of the rule of law might be to say that the rule of law is what Natural Law would become if it were translated into positive law. Plato's summary was:

[W]hen I call the rulers servants or ministers of the law, I give them this name not for the sake of novelty, but because I certainly believe that upon such service or ministry depends the well- or ill-being of the state. For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of

44. O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800*, at lviii (E. Barker transl. 1957) [hereinafter cited as GIERKE].

45. See *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* (H. Fisher ed. 1911).

46. 4 *THE DIALOGUES OF PLATO* 211 (B. Jowett transl. 4th ed. 1953).

the law, [has salvation,] and . . . every blessing which the Gods can confer.⁴⁷

Aristotle added the characteristic amendment that it was not enough for the state to be merely law abiding. It was not just following the laws that provided for the rule of law, but following *good* laws. This became his basis for distinguishing between the three virtuous forms of government and their corrupt forms.⁴⁸

Plato's notion was really more naturalistic than was Aristotle's, and in this matter as in many others, the modern naturalist Francis Bacon reverted to the Platonic concept in describing the rule of law. To Bacon the rule of law is simply the opposite of the rule of violence and terror.⁴⁹ With Bacon the rule of law begins to approach the modern Anglo-American notion of due process of law: the traditional procedures and forms that must be followed when actions are taken in the name of government. The sociologist Gaetano Mosca gave a naturalistic interpretation. This was the basis for his notion of "juridical defense."⁵⁰ Mosca argued that regardless of the formal structure of the state—monarchy, aristocracy or democracy—any state that had existed over a long period of time found it necessary to regularize the relationships between the rulers and the ruled.⁵¹ The ruled had to know what was expected of them, and the rulers had to know what they could count on. This was not because of any altruism, but merely so that the business of a political community could get done and so that the rulers could count on holding their positions with security. In this sociological view, the rule of law is the deep structure of the state. It expresses a conservative structural principle that must ultimately develop in every stable political organization. Here conservatism is used in the same sense as when the biologist states that the gene structure of an organism represents a conservative principle. A similar notion is found in those who suggest that in order to survive, the modern corporation must develop rule of law relationships between managers and employees: the application of the principles of constitutionalism to internal corporate affairs. Albert Venn Dicey, who carried on the classical liberal idea of constitutionalism, was the most

47. *Id.* at 285.

48. See F. WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* 10-25 (1949) [hereinafter cited as WORMUTH].

49. 9 *THE WORKS OF FRANCIS BACON* 313 (J. Spedding, R. Ellis & D. Heath ed. 1854) [hereinafter cited as WORKS].

50. MOSCA, *supra* note 6, at 120.

51. *Id. passim.*

eloquent of those who identified the rule of law with constitutionalism.⁵² A more recent expression of this position is found in Frederic A. Hayek's *The Constitution of Liberty*.

In all of these instances, there is implied a viewpoint similar to that of medieval English folk law. It is assumed that the substance and the content of what will be done is intrinsically just; all that is required is to regularize the procedures through which authorities act.

If a pre-existing social organization is assumed to be valid, or if the principles of valid social organization are assumed to be pre-existent, like the rate of acceleration of falling bodies, these principles need only be discovered and applied, they need not be validated. All that is required is a process of discovery which can be shown to be procedurally valid. There is no fundamental difference between the higher law tradition of medieval English common law and the rule of law tradition of neo-classical liberalism. Both were attempts to spell out the functional ethic implicit in a given social system, and both were equally accurate and scientific, from a structuralist point of view. Both approaches revealed the systemic juridical implications of social orders that were taken as "given." Professor Hayek's impressive book probably should have been called "The Constitution of Liberalism," for what he did, with great theoretical elegance, was to construct an abstract model of a liberal culture and then trace out its implicit ethical norms, stating them abstractly in the form of the functional juridical principles which comprise the constitutional prerequisites for such a culture: an abstraction of the constitutional implications of a given (liberal) social system. Similarly, the 12th century jurist Glanvill, in writing the first textbook of English law,⁵³ produced an abstraction of the constitutional implications of the way his own society worked. Both resulted in abstract legal models of a social system. Each model, in turn, could be subjected to a functional analysis; each juridical model could be inspected to find out what were its implicit prescriptive norms. The result—the prescriptive norms implicit, for example, in Glanvill's model—could be called "medieval constitutionalism." This, in effect, was the task to which Professor McIlwain devoted much of his life and which he summarized in the book *Constitutionalism, Ancient and Modern*. Constitutional theory requires just this sort of work. It consists of deriving the functional prescriptions implicit in abstract models derived from social systems. The models may also be prospective, as

52. DICEY, *supra* note 3.

53. R. GLANVILL, *TRACTATUS DE LEGIBUS ANGLIAE* (1187-1189).

in the constitution-making done by the founders of the American Constitution. Constitutional theory amounts to the implicit final causes of a social system—the constitutional behavior that must take place in order for it to function properly.

Hence, as in Philadelphia in 1787, it is possible to invent rather than merely to discover constitutional principles. Natural Law discovered the prescriptive implications of going institutions. Although it involved a rational process, the institutions from which it worked had developed non-rationally. We may paraphrase Aristotle's criticism of Plato's notion of the rule of law in this connection. Aristotle had said that the rule of law was not merely following the law, but rather following good laws. And we may add that it is not only deriving the prescriptive implications of going institutions that provides sound projections, but also deriving the prescriptive implications of more rational possible institutions. The greater validity of such invented prescriptions does not rest upon the ethical fiat attached to them but upon the fact that they better describe the "necessary relations arising from the nature" of the society. Ethical fiat and Natural Law are constitutionalism in its "utopian" stage—as it has been said that medieval astrology and alchemy were astronomy and chemistry in their utopian stages. Ethical fiat is attached to a functional prescription when it cannot be proven—as was attempted in the *Federalist Papers*—to be a necessary final cause. It is an attempt to short circuit the process of proving the necessary implications of a given system of relationships much as magic short circuited the process of uncovering causal relationships. The only validity constitutionalism can have is functional validity. Each of the conventions of the "unwritten" British Constitution can be shown to have been derived in the same way that the ordinary English judge derived the everyday principles of the "unwritten" common law. Both are instances of the rule of law, and both are instances of efforts to describe the prescriptive implications of the necessary relations arising from the nature of the social institutions specific to England at a given time. As we shall see later, the same process was at work in the "invention" of the American Constitution.

One of the most important conventions of the British Constitution is the principle that the opposition party does not precipitate a government crisis unless it is able and prepared to accept the responsibility to form a new government. This convention is stated in the form of a prescription. But it is not an ethical prescription; it is a functional prescription. British parliamentary institutions would not work if this

prescription were not observed. After World War II, the West Germans were so persuaded of the functional necessity of this prescription that they wrote it into their new constitution. Its importance to German constitutionalism derives not from its being in their Basic Law but in the fact that it is a sound functional prescription implicit in the operation of a specific political system.

There are several modes of projection that aid in deriving functional prescriptions that are subject to analytical verification. For any proposed rule of action its long-run implications may be different from its short-run implications. The long-run qualification of the proposed rule of action may be revealed by projecting it through time, space, function and structure. For any given rule of action its universal implications may be different from its particular implications. These, as Kant indicated, may be seen by generalizing it for all men. For any given action its intrinsic implications may be different from its extrinsic implications. These may be seen by measuring its degree of concatenation with other actions also required by the social system.

Systemic functional prescriptions are like the conventions of the British Constitution. They are properties of the overall social system rather than of its individual components. Certain types of actions will be functional requirements of the system.

These modes of projection are the formal procedures out of which constitutional theory is derived. It exists in the form of hypothetical quasi-symbolic behavioral norms. On the theoretical level its validity may be formal, but the test of validity will be the extent to which function necessity can be proved in theory—the extent to which they are the axiomatic properties of a projected social system. This is a shorthand expression of what occurred, or what was summarized, in the Philadelphia Constitutional Convention and in the *Federalist Papers* that followed. This will be returned to later in the discussion of how American Constitutionalism was invented. First, however, the democratic component of constitutionalism must be addressed. This is constitutionalism seen as the institutionalization of civil disobedience.

III. THE INSTITUTIONALIZATION OF CIVIL DISOBEDIENCE

A. *Introduction*

Even before the 13th century, England's kings had encountered disobedient baronial uprisings. As we look back on them it is hard to

know which side had the greater claim on justice. Did the common people fare better when the great barons held the king in check? Or did that check on royal authority merely permit the barons to behave more despotically at home toward their own subordinates? But if we restrict our concern to the relationships between king and barons alone, the issue is clearer. The barons resorted to civil disobedience in resistance to royal despotism.

The feudal period was a millennium of institutionalized cold war: Church against State, State against State, and Church against Church. The principals themselves—popes and kings—seldom fought against each other directly. Rather, they deployed their forces as players at chess. The “pieces” were cities, baronies, provinces and marcher states; the gambits were alliances, dynastic marriages and ultimately armed confrontation, which usually involved employment of a floating population of mercenaries; those armed entrepreneurs of feudal warfare who flourished until the 15th century when royal gunpowder blew rebellious barons out of their adulterine (unauthorized) castles. Four hundred years of chessboard feuding produced not only chivalry and “rules of war,” but also typical patterns of conflict resolution. Chief among these was a special form of peace treaty with which internal baronial struggles were brought to a close. Here the prime example was the Magna Carta of Runnymede that was forced upon King John in 1215. For the ensuing four and a half centuries, it was successively royally abrogated and baronially reinstated—and then amended, extended and amplified—so often, indeed, that social compacts and charters of liberties became a way of life and thought natural to Englishmen.

Of ancillary importance was an even more frequent form of conflict resolution: the deposition, and sometimes the beheading, of the king's chief ministers, even when it was the king himself who was the real target of the uprising.

The result was that rebellions, successful ones, that is, by ending with written charters and ministerial depositions, tended to induce Englishmen to think of kingship (not yet “sovereignty”) and the “crown” as a regal field of force out of which power could be produced and controlled. The control devices were charters which expressed immemorial rights and laws; their observance was insured by ministerial deposition.

But the ultimate control of the barons was their readiness and ability to resort to violence. Hence, the resort to violence, the rule of

law, and ministerial dismissal came to be the three features that characterized the deep structure of medieval English kingship. Gradually, as Maitland pointed out, the "crown" came to be thought of more as a political institution than a bejewelled chattel residing in the Tower of London, and of the king who possessed it as the one who for the moment exercised that institutionalization of majesty. From this standpoint the "crown" was a set of rules and roles, and the "king" was their personalization—their anthropomorphic embodiment—not the other way around. Hence, the maxim that "king could do no wrong." At first this meant, in effect, at least he'd better not or he'd get his come-uppance. But ultimately it meant, in addition, that he was, in principle (we would say constitutionally), unable to do wrong.

If wrongdoing occurred, it was attributed to the human administrative fallibility of the person who happened to possess the crown and the officers through whom he acted rather than to a defect inherent in the crown itself. As the functions of the crown expanded and as the corps of royal officials grew, nearly all actions bearing the royal seal were actually done by crown ministers. Then the doctrine that the king could do no wrong was extended to mean that any wrongdoing in his name was the result not of his own fallibility but of bad advice by his ministers. Grievances that led to civil disobedience still targeted upon the King and his armed supporters as their immediate object, but the remedy was the supplantation (initially the execution) of his errant ministers. These countervailing processes remained tinged with violence well into the 16th century. At that time, however, the Tudors were able to deploy cannon against castles and effectively "nationalize" the means of baronial violence. Exploitation of the technological advantage inherent in gunpowder led to the long period of constitutional stalemate we know, somewhat erroneously, as "Tudor absolutism." However, institutional development was not stalled. Indeed, the ultimate effect was to institutionalize precisely those forms of civil disobedience that had been earlier pioneered and later virtually ritualized—baronial uprisings were transplanted first into parliamentary obstructionism and later into "His Majesty's loyal opposition"; the imposition of chartered rights was transformed into justiciable common pleas; ministerial deposition was translated into impeachment.

All this first came to a head under James I, and the process of transition is best symbolized by the enmity between James and Parliament on the one hand and Justice Edward Coke and Chancellor Francis Bacon on the other. Full institutionalization was to be nearly a century

in the future, but already with the impeachment of Bacon in 1621 and the Petition of Right in 1628, the twin foundations of British constitutionalism, the rule of law and impeachment, were in place. Moreover, at that early stage we can still observe lurking just behind these nascent devices the medieval rebellions from which they had sprung. And we can see as well their structural identity with civil disobedience: constitutionalism as the institutionalization of civil disobedience.

So much for the preliminary statement of the thesis; what of the evidence? A simple chronological catalogue of events will suffice.⁵⁴

B. Civil Disobedience in English Kingship

Arms were relatively cheap. War was entrepreneurial. As a result, violence was always a close cousin to kingship. The pattern of the future had been set even before Magna Carta. William the Conqueror's successor, William (Rufus) II, was beset frequently by rebellion. After William II's death in a hunting accident, his brother became the first of a long line of crown snatchers and acceded to the throne as Henry I. Stephen followed suit, but as king he reaped chiefly a civil war for his pains. Its conclusion found the great barons, acting as power brokers, mediating the terms on which royal power would be exercised. For enforcement they could rely upon armed bands that could be called up promptly from thousands of "castles." These were mostly crude earthen work and wooden constructions from which armed men conducted their excursions. The chronicle of the times states: "Every shire was full of castles and every castle filled with devils and evil men."⁵⁵ The chronicler added that the people moaned that "Christ and his saints slept."⁵⁶

Henry II was besieged by rambunctious Church magnates as well as lay barons. The Constitutions of Clarendon asserted lay primacy for a while, but after the murder of Thomas Becket, Henry was brought to his knees. Two rebellions were mounted by his own sons under the pretext of bridling the king's excesses.

Richard (lion-hearted) I, while away at the Crusades, was undermined by Prince John, his brother, who deposed the King's chancellor and struck, unsuccessfully, for the throne during Richard's captivity in Europe. The authorized ministers resisted, however, and kept power

54. See 5-8 CAMBRIDGE MEDIEVAL HISTORY (1926-36).

55. ANGLO-SAXON CHRONICLE: THE PETERBOROUGH CHRONICLE 1070-1154 (2d ed. C. Clark 1970).

56. *Id.*

effectively in their own hands. Next, "bad king John," of Magna Carta (1215) fame, was humbled first by the Church and then by the barons at Runnymede. Magna Carta was more than merely another gathering of boisterous barons. They had both force and, under the impetus of the prelate, Stephen Langton, a program. This transformed what otherwise might have been an historically commonplace event into a momentous event.

The fact that Magna Carta contains the classic statement of the rights and liberties of all Englishmen is well known. Less familiar is Chapter 61 describing the "form of security." This provided for a council of 25 who were to be the guardians of the charter. In the event of an infringement the matter could be brought to royal attention by 4 of the 25. If correction did not occur within 40 days, the committee of 4 was empowered to convene a full meeting of the council of 25 to put things right. The 25, with the community of the whole realm, agreed King John, "shall distrain and trouble us in all possible ways by taking our castles, lands, possessions."⁵⁷ Edmund Burke, who is not generally classed among the Whig historians, summarized Magna Carta by saying that "if it did not give us originally the House of Commons, gave us at least a House of Commons of weight and consequence."⁵⁸

Whether or not this was the true beginning of the Commons is irrelevant; it provided the pattern for a series of authority struggles that studded every decade of medieval English history. And until the 16th century Tudor consolidation of royal power, a large proportion of the medieval anti-royal revolts were successful, and most of those were consummated with concessions extracted from a disciplined King who was forced to agree in writing to follow certain stipulated practices, to appoint special crown councillors named by the rebels, to dismiss hated officials and to rule only through regular assemblies. King John tried to ignore Magna Carta and, just before his death, he was faced with another civil war formed around Prince Louis (of France) as well as the rebellious English barons.

The regents of young Henry III (aged 9) re-issued the charter and put the barons down for a while. Later, however, the chancellor was driven from office at the "Mad Parliament" and the "Provisions of Oxford" adopted. These placed the government under three cumbersome committees of barons and bishops. They, in their turn, however, were confronted by a baronial counter force and required to grant the

57. MAGNA CARTA art. 61. See W. WARREN, *KING JOHN* 276 (1961).

58. 2 *THE WRITINGS AND SPEECHES OF EDMUND BURKE* (1901).

"Provisions of Westminster." When Henry persuaded the Pope to rescind these, the barons again rebelled, extorted from the captive king the "Mise of Lewes" and called "Montfort's Parliament 1265" to restore matters and hold the king in ward. Prince Edward, however, destroyed Montfort, extricated the king at the Battle of Evesham, and shortly thereafter became the first king in English history to ascend the throne without some form of election.

Edward, whose motto was *pactum serva*, "Keep Troth," as it was translated, introduced many constitutional innovations which strengthened the crown by regularizing royal administration procedures. Gaetano Mosca's principle of "juridical defence" could have been derived from the effects of that reign. To finance a two-front war, King Edward summoned the "Model Parliament" (1295) "because that which touches all should be approved of all."⁵⁹ This was patterned after Montfort's parliament and included burghers, as well as knights and clergy, and did indeed become the model for the future. But as fighting became costlier, the baronage and the clergy became more parsimonious. Edward's new prerogative tax, the "mal toll," was resisted and rebellion spread. Shortly he was forced to accede to a parliamentary petition which took control over taxation away from the *curia regis* and placed it in the assembly.

Edward II ran into domestic troubles immediately over his impolitic choice (Pierr Gaveston) for chief councillor. During the ensuing struggles Gaveston was shuttled in and out of office. Under Edward's cousin Thomas, Earl of Lancaster, the barons (1311) again brought the king to heel and placed Edward on a £10 per day allowance. Soon, however, it was Lancaster's turn, and (1318) a baronial faction removed him and set up a new council. Edward then turned to two ambitious magnates, the Despensers, who quickly discharged the ruling barons, only to court their own dismissal and exile at the hands of the armed and resurgent barons in the Parliament of 1321. The next year, when Edward tried to reinstate the Despensers, the Lancastrian faction rebelled but Edward defeated Thomas and beheaded him on the spot (Boroughbridge). This effected a near martyrdom for Lancaster and the enmity of his wife, Isabella. She joined the Lancastrian party, deposed and then killed the king and elevated the young Edward III to the throne. He, however, expelled his mother's partner, Mortimer, called a Parliament and avenged his father's murder.

The Hundred Years' War (1337-1453) had prominent institutional

59. L. SALZMAN, EDWARD I, at 211 (1968).

effects; it was so expensive, kings were forced to trade parliamentary concessions for money. Edward actually went bankrupt in 1345 and his repudiation of debts ruined several great Italian banking houses. The Black Death (1348-49) depopulated the nation, struck selectively against the poor, and inaugurated an economic revolution that ultimately displaced the feudal serfs with yeoman farmers, but not without a series of agrarian riots. This was also the town building era, stimulated by the growth of the weaving trades and the appearance of the merchant princes. Social mobility became quite rapid. The Poles of Hull rose from tradesmen to dukes in three generations.

Reverses in France led to strife at home, and demands that Lancaster be removed from office. John Wycliffe joined forces with John of Gaunt, leading to the "Good Parliament" of 1376. Again, the pattern of the past was repeated. The King's ministers were accused of corruption and deposed, and then the King was forced to accept a council of 12 peers with authority reminiscent of the "lord's ordainers" that had been placed over his father. Afterward, however, Lancaster's response was to pull off something like a *coup d'état*. He released the deposed ministers, dismissed the council of 12, and declared the statutes of the Good Parliament null and void.

After the accession of Richard II, a new Parliament returned to the work of 1376 and turned out the Lancastrians. The young Richard was made to agree that "no act of parliament can be repealed save with parliament's consent."⁶⁰ However, the new government ran into troubles of its own and these issued in the "Great Revolt of 1381," ostensibly to repeal the poll tax that had been instituted the year before. The insurgents flooded to London from rural bases led by the "mad priest of Kent," John Bull. They denounced the barons as "traitors," and chanted the radical refrain:

"When Adam delved and Eve span
Who was then the gentleman?"⁶¹

They demanded all differences of rank, status and property be abolished. Soon Wat Tyler emerged as their organizer, and the movement assumed "modern" revolutionary characteristics, combining military organization with an equalitarian ideology. Tyler stormed London and forced the young king to appear at the parley of Mile End. But the rebellion was quelled with a single stroke: The Mayor of London

60. C. OMAN, *THE GREAT REVOLT OF 1381*, at 150 (1961).

61. The phrase acquired currency some decades earlier. See R. LINDSAY & R. GROVES, *THE PEASANT'S REVOLT 1381*, at 61 (1974).

surprised Tyler and cutlased him to death on the spot. A new Parliament quickly revoked the concessions of Mile End, adding that no grant of privileges could be valid without the "consent of the Estates of the Realm."

Before long, however, Richard himself had provoked the barons. They banished his chief ministers, declared themselves "lords appellant" and proceeded to charge the King's former ministers with treason. The king's meager forces were routed at Rodcot Bridge (1387), and Richard was placed under the control of a council of ministers. However, 10 years later, a mature Richard struck back and in a *coup d'etat* took his revenge. He routed the barons, intimidated Parliament and gathered power into his own hands. By the end of the century, however, armed opposition forced him to declare himself "insufficient and useless" and to abdicate.

The throne, having been declared vacant, was next occupied by Henry IV, who, being, in effect, an elected king, appeared to sanction the doctrine that kings could be deposed for incapacity and maladministration. Even so, he was soon confronted with the abortive "rebellion of the earls," which ended his taste for being a "lawful king." Rebellion and rioting became endemic, in part abetted by the Lollards, and the court split into two implacable factions which his successor, Henry V, was able to avoid only through excursions in France.

Henry VI, an infant king, was the pawn of contending would-be regents, whose squabbles ultimately resulted in the impeachment of Suffolk, and this was followed by Jack ("John Amend-all") Cade's rebellion. The eve of the War of the Roses (1453-1497) was at hand.

Strokes and counter-strokes became commonplace, and while the lords killed each other off, the common people prospered. By the beginning of the 16th century, the age of baronial countervailing violence was brought to a close by the advent of Henry VII, the first of the Tudors. Henry, unsteady at first, gradually consolidated royal power, outlawed baronial entrepreneurial warfare and deferred royal accountability tenuously to the 17th century when new models of popular opposition, abetted by new model armies, ushered in the series of constitutional struggles that led to our own era.

To the extent it did anything, the medieval English Constitution can be said to have institutionalized civil disobedience. As doctrinal rationalizations of baronial insurrections became perfected, the opposing sides came to recognize that there were two distinct realms of royal authority. One dealt with extraordinary situations such as foreign

relations and war making. Here the king was supreme. The other dealt with the settled law of the land governing domestic feudal relationships. In this area the king was under the law. However, it was not always easy to tell whether a given royal act fell under the one or the other. And in the event of a dispute, who was to decide the matter? There was no principle of judicial review under which a constitutional challenge could be taken to a high court for resolution. On the contrary, the High Court of Parliament was the king's court. The justices and law clerks were crown appointees and might be counted on to rule in the king's favor. Thus those early disputes were something like the ones that arise today between labor and management. If a dispute between king and barons could not be settled by negotiation, the only recourse open to the barons was to strike against the king, which they frequently did. But to attack the principle of royalty was hazardous, even when done in the name of the law. For one thing, the authority of the barons toward their own vassals rested upon the same principle of allegiance as did the king's authority over the barons. To threaten the higher jeopardized the lower. Accordingly, it became a maxim among the barons that their disobedience was not a violation of their personal loyalty to the king, nor did they claim that allegiance was more owing to the laws than to the king, a doctrine incompatible with kingship. Instead they developed the doctrine of the king's wicked advisers. According to this doctrine, it was not the king himself who was at fault if wrong was done; rather it was held that the king could do no wrong. If wrong occurred, it was because the king was the victim of wicked advisers. The barons could then oppose the policies of evil councillors without seeming to challenge the principles of kingly authority itself. Wicked advisers had to be purged, they argued, to insure that the king's proper will could find expression. Gradually, over many centuries, this form of baronial civil disobedience became institutionalized in Parliament through impeachment proceedings against errant ministers of the Crown. This, in turn, led to the emergence of the working principles of the British Constitution—the principle that the king acts only on the advice of his ministers; the principle that the ministers of the king's cabinet are responsible to Parliament for acts done in the name of the Crown; and the principle that a Cabinet must resign if it loses the confidence of Parliament. McIlwain indicates that British constitutionalism is little more than the institutionalization of civil disobedience.⁶²

62. McILWAIN, *supra* note 2, at 374-75.

C. *Civil Disobedience in the Early Republic*

This is all very well for a monarchy, but how does one translate these principles to make sure they will operate in a democratic republic? How can there be wicked advisers in such a democracy? Advisers to whom? To the President? No, because loyalty is not owing to the President, only to the nation itself. Our pledge of allegiance is "to the flag and to the republic for which it stands." In a republic the nation itself takes the place once held by monarchs. A republican version of the doctrine of evil counsel can apply only if, as in Nazi Germany, a nation's official administration becomes tyrannical. So in a democracy the administration takes the place of the king's wicked advisers, which is what happened under the administration of Richard Nixon. This is also the way despotism is described in the collectivist democracies. Despotism in a constitutional republic occurs when an errant administration "gives evil counsel," so to speak, to the government. But how does one impeach an administration? Quadrennial elections might provide a partial solution if the opposing parties could make the election a referendum on the incumbent administration. While this sometimes occurs, it seldom works effectively due to the vast assortments of conflicting interests and pressures at work in each of our major parties. This has led political scientists to describe them as parties of compromise rather than principle, a factor that frustrates the possibility of making an election a clear referendum on the incumbent administration. Constitutional history shows that constitutionalism is not safe unless individuals are secure in their right to defend it through acts of civil disobedience. The tradition of civil disobedience must find vitality through devices for opposing and checking oppressive actions by the ruling administration. This is not as paradoxical as it may at first seem.

It was not too far back that the English doctrine of His Majesty's "loyal" opposition was also deemed self-contradictory, for how could one who opposed the King be considered loyal? Closer to home, we can recall that John Brown's insurrection opened the door to many of our own contemporary doctrines of civil liberties. Two of America's major contributions to political theory, Thoreau's *Civil Disobedience* and Calhoun's *Discourses*, were devoted to the philosophical and constitutional foundations of civil disobedience. The Constitution of Massachusetts explicitly protects the "right" to revolution. The American Constitution itself is founded on this right, and John Locke, whose doctrines were studied carefully by our Founding Fathers, was history's chief theoretician of the right to revolution. Locke argued that the

civil liberty, in the end, rests upon two rights: to revolt or to seek refuge from oppression in "*vacuus locus*."⁶³ Otherwise, Locke argued, no constitution is proof against tyranny. All this is well known, and yet there remains in our minds a seeming contradiction between the government's need to rule and the obvious necessity for citizens to resist tyranny.

A beginning, but only a beginning, was made by the framers of the American Constitution. They themselves had just carried through a successful act of civil disobedience. As with their baronial precursors, they had first stated their case in the name of their allegiance to the person of the king, claiming that Parliament had taxed them in violation of the British Constitution. The historical evidence shows that these ideas were thoroughly discussed in the colonies prior to the outbreak of the War of Independence.⁶⁴ Civil disobedience and the doctrine of the king's wicked advisers were central colonial issues. Had there been a way for England to acknowledge a privileged constitutional status for colonial civil disobedience, the War of Independence might never have occurred. However, there was no way for that to happen.

In certain imperial disputes appeal lay to the law lords—the high justices who sat in the House of Lords, but this concerned only colonial matters, such as disputes between colonists and the Governor General. There was no way to appeal a Parliamentary enactment even though cases dating from before the victory of the parliamentary forces in 1688 indicated that enactments of the English parliament might not have the force of law inside the colonies. This was what the colonists claimed, and constitutional historians have not yet resolved the debate. The colonists, citing the English doctrine that the king can do no wrong (wrongful acts of the crown being attributed to the King's wicked ministers) justified their opposition in accordance with the English tradition of civil disobedience. But this required the ability to impeach errant ministers, which was obviously impossible for colonists to do. It was necessary to find an alternative target as the object of colonial civil disobedience, namely the parliamentary decrees themselves—civil disobedience as the impeachment of an objectionable law rather than an errant minister. But while it was easy to see how ministers might be in error, how could a law be at fault, especially in England where Par-

63. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 183 (1956 ed.).

64. See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 55 (1967).

liament was sovereign? This was the constitutional issue of the American Revolution, for the Americans, in visualizing a way to institutionalize their own form of civil disobedience, first had to create a sovereign British Constitution so they could put forward the concept of unconstitutionality. Then civil disobedience, by analogy with the English past, was valid when directed against "unconstitutional" law. But this doctrine was unintelligible to 18th century English parliamentarians. How could such an issue be adjudicated? Parliament was sovereign. No other body could declare its acts unconstitutional.

Not so, replied the colonists, for they were doing so and they cited the ancient law cases in their behalf. But the English merely replied by stating what the law was. And the law, as Parliament definitively announced it, demanded colonial compliance. Obviously, something more was required, and that something was one of three things: capitulation by one of the parties, war, or some institutionalized device for adjudicating such disputes. Both rejected the first, and lacking the third, only war remained. But the dilemma persisted, and following the war, the Americans returned to its solution: the invention of judicial review. Civil disobedience could be institutionalized on the level of statutes as well as ministers if a way could be found to impeach them.

This was how the American revolutionaries contributed a special cluster of concepts to constitutionalism: a sovereign hypostatized Constitution, unconstitutionality, an autonomous Supreme Court and the judicial review of the constitutionality of impeached governmental or legislative acts. This inaugurated the institutionalization of civil disobedience on an entirely new constitutional plane. Such inventions are rare historical occasions, and it is worthwhile to inspect the writings of one of those who participated in that invention. As with all significant social inventions, the tributaries that fed its emergence are numerous and arise from several different sources. But civil disobedience was one of the cornerstones of the characteristic features of American constitutionalism. With Watergate, and the suppression of civil disobedience it symbolized scarcely behind us, this lesson requires sturdy reinforcement. The passage that follows is taken from the closing paragraphs of James Wilson's "Speech Delivered in the Convention For the Province of Pennsylvania" (January, 1775):

And now, sir, let me appeal to the impartial tribunal of reason and truth—let me appeal to every unprejudiced and judicious observer of the laws of Britain, and of the Constitution of the British government—let me appeal, I say, whether the principles on which I argue, or the

principles on which alone my arguments can be opposed, are those which ought to be adhered to and acted upon—which of them are most consonant to our laws and liberties—which of them have the strongest, and are likely to have the most effectual, tendency to establish and secure the royal power and dignity.

Are we deficient in loyalty to his majesty? Let our conduct convict, for it will fully convict, the insinuation, that we are, of falsehood. Our loyalty has always appeared in the true form of loyalty—in obeying our sovereign according to law: let those, who would require it in any other form, know, that we call the persons who execute his commands, when contrary to law, disloyal and traitors. Are we enemies to the power of the crown? No, sir: we are its best friends: this friendship prompts us to wish, that the power of the crown may be firmly established on the most solid basis: but we know, that the constitution alone will perpetuate the former, and securely uphold the latter. Are our principles irreverent to majesty? They are quite reverse: we ascribe to it perfection, almost divine. We say, that the king can do no wrong: we say, that to do wrong is the property, not of power, but of weakness. We feel oppression; and will oppose it; but we know—for our constitution tells us—that oppression can never spring from the throne. We must, therefore, search elsewhere for its source: our infallible guide will direct us to it. Our constitution tells us, that all oppression springs from the ministers of the throne. The attributes of perfection, ascribed to the king, are, neither by the constitution, nor in fact, communicable to his ministers. They may do wrong: they have often done wrong: they have been often punished for doing wrong.

Here we may discern the true cause of all the impudent clamour and unsupported accusations of the ministers and of their minions, that have been raised and made against the conduct of the Americans. Those ministers and minions are sensible, that the opposition is directed, not against his majesty, but against them: because they have abused his majesty's confidence, brought discredit upon his government, and derogated from his justice. They see the publick vengeance collected in dark clouds around them: their consciences tell them, that it should be hurled, like a thunder bolt, at their guilty heads. Appalled with guilt and fear, they skulk behind the throne. Is it disrespectful to drag them into publick view, and make a distinction between them and his majesty, under whose venerable name they daringly attempt to shelter their crimes? Nothing can more effectually contribute to establish his majesty on the throne, and to secure to him the affections of his people, than this distinction. By it we are taught to consider all the blessings of government as flowing from the throne; and to consider every instance of oppression as proceeding, which in truth is oftenest the case, from the ministers.

If, now, it is true, that all force employed for the purposes so often mentioned, is force unwarranted by any act of parliament; unsupported by any principle of the common law; unauthorized by any commission from the crown—that, instead of being employed for the support of the constitution and his majesty's government, it must be employed for the support of oppression and ministerial tyranny—if all this is true—and I flatter myself it appears to be true—can any one hesitate to say, that to resist such force is lawful: and that both the letter and the spirit of the British constitution justify such resistance?

Resistance, both by the letter and the spirit of the British constitution, may be carried farther, when necessity requires it, than I have carried it. Many examples in the English history might be adduced, and many authorities of the greatest weight might be brought, to show, that when the king, forgetting his character and dignity, has stepped forth, and openly avowed and taken a part in such iniquitous conduct as has been described; in such cases, indeed, the distinction above mentioned, wisely made by the constitution for the security of the crown, could not be applied; because the crown had unconstitutionally rendered the application of it impossible. What has been the consequence? The distinction between him and his ministers has been lost: but they have not been raised to his situation: he has sunk to theirs.⁶⁵

Let us briefly recapitulate what Wilson said. First he invoked reason as the basis of an "appeal" to Britain's laws and constitution. Such principles, he said, were consonant with "our laws and liberties," which also "establish and secure royal power and dignity." True loyalty consists of obeying the sovereign "according to law," and to require it in any other form would actually be disloyalty. This perfectionist conception of the constitution makes the king's majesty equally perfect, for the two must be identical in order to validate the doctrine that the king can do no wrong. Hence oppression must be opposed because oppression "can never spring from the throne," "[o]ur constitution tells us, that all oppression springs from the ministers of the throne[.]" and they do not partake of the king's immunity from wrongdoing.

Evil ministers cannot be permitted to use the crown as a shield for wrongdoing. The constitution requires that they be unveiled. Any force they use to perpetrate evil can be opposed, and to do so is constitutional.

Of course, if the king himself were to violate the constitution and join the forces of evil, that would be unconstitutional because it would

65. 2 THE WORKS OF JAMES WILSON 757-58 (R. McCloskey ed. 1967) (footnote omitted).

invalidate the distinction between a perfect kingship and imperfect ministers. This would also undermine the institutionalized civil disobedience that derived from impeachment. In that case, of course, civil disobedience against the king himself would be constitutionally protected.

Protected by whom or by what? In order to defend civil disobedience carried to such a length, Wilson had to appeal to a constitution standing above both ministers and king. This new hypostatized constitution would have to limit all unconstitutional governmental acts because unconstitutional acts by a king could not be punished under the English principle that the king acts only through his ministers who are responsible solely to Parliament. Hence, the only form of civil disobedience that remained open to the colonists was outright rebellion. And while they heartily adopted this option vis-à-vis England, they tried to forestall the need for its repetition in their own new government by constitutionalizing a new world form of civil disobedience. This, as was quickly apparent, required the institution of the principle of judicial review. Otherwise there would be no reliable way to enforce the supremacy of the Constitution when the head of the government was at fault. Other forces led toward the same end, but the initial role of civil disobedience in shaping American constitutionalism must be accorded prime significance.

Despite the differences, the institutionalization of civil disobedience in both England and America was stimulated by the success of oligarchical forms of civil disobedience. Eighteenth century constitutionalism was the institutionalization of *elitist*, not mass, civil disobedience. The American Constitution tried to prevent the national legislature from adversely affecting the interests of local elites. This was provided for in the grant of legislative power and also through federalism. Hamilton, who privately advocated greater centralization than was provided for in the Constitution, attempted to assuage the fears of those who thought the new system gave too much power to the national government by arguing that the states would never permit the central power to be misused. The states would monopolize the ordinary administration of criminal and civil justice and

[t]his great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure so decided an empire over their respective citizens as to render them at all times a complete counter-

poise, and, not unfrequently, dangerous rivals to the power of the Union."⁶⁶

Hamilton here was stating his own fears as reassurances to his opponents. It proved more prophetic than he would have bargained for.

Madison, as might be expected, gave an even more explicit rationale of state-based civil disobedience, using arguments that later were systematized by Calhoun:

[S]hould an unwarrantable measure of the federal government be unpopular in particular States . . . the means of opposition to it are powerful and at hand. . . . A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other [T]he existence of subordinate governments, to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.⁶⁷

This proved to be an uncanny forecast of Jefferson's "political revolution" of 1800.⁶⁸

Initially, federalism was the doctrine that citizens possessed dual citizenship and allegiance. One was to their state and its laws, the other was to the central government. Clearly, this was an effort to institutionalize, inside the new government, protections against the kinds of despotism that the English parliament had visited on the colonies. States rights, interposition and secession were the ultimate guarantors. This constitutional theory of federalism as the institution-

66. THE FEDERALIST No. 17, at 120 (New American Lib. ed. 1961) (A. Hamilton) [hereinafter cited as THE FEDERALIST]. See also THE FEDERALIST No. 84, at 516: "The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration"

67. THE FEDERALIST No. 46, *supra* note 66, at 297-300 (J. Madison).

68. D. Sisson, THE AMERICAN REVOLUTION OF 1800 (1974) [hereinafter cited as Sisson].

alization of civil disobedience was later explained by John C. Calhoun. While federalism could not be called the institutionalization of *popular* civil disobedience, it was the primary device the Founding Fathers used to prevent the recurrence of what they had rebelled against. It was utilized on a minor scale several times but foundered over the slavery issue. Finally, the tie between federalism and civil disobedience was eliminated as a result of the Civil War. Seen in this light only, the Civil War had a deconstitutionalizing effect. We have now explored the anthropological and historical sources for constitutionalism's twin ingredients, the rule of law and institutionalized civil disobedience. Before applying these lessons to our present constitutional crisis it will be helpful to investigate the contemporary debate over constitutionalism. For, as we shall see, there are two schools of interpretation. Neither gives proper recognition to the two ingredients of constitutionalism explored here. One, the "Anglicans," thinks too little should be done. But the other, the "Americanists," over-estimates the significance of the specific institutional devices of the 1789 Constitution and espouses reforms that are too superficial.

IV. THE CONTEMPORARY DEBATE OVER CONSTITUTIONALISM

A. Introduction

So far we have had little to say about constitutionalism as a concise body of doctrines. One reason is that the term itself is of relatively recent usage; the doctrines associated with it do not acquire precision until we are well into the 20th century.

A constitution, at Roman law, was merely an enactment by the Emperor. That usage was consistent with the etymology of the word—to make, set up, or put in place—and also with the meaning it had during the Middle Ages, as for example in the Constitutions of Clarendon of 1164,⁶⁹ drawn up during the reign of Henry II to define the limits of civil ecclesiastical jurisdiction. With minor exceptions,⁷⁰ the term did not, until the 17th century, convey the idea of the fundamental frame of government, for the primary meaning of constitution referred to man-made positive, rather than declarative, law. Hence, after the 15th century, as man-made plans of church and civil government began to appear, it was appropriate to refer to them as constitutions, and

69. C. MCLWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* 23 (1947) [hereinafter cited as *CONSTITUTIONALISM*].

70. *Id.* at 25.

only after that could the term constitution come to mean the structural forms and limits set up by men for government.

Of course one did not create constitutions out of nothing nor from whim. They had to possess validity of some sort and, as we have seen earlier, this typically derived from a more fundamental law of God, reason or nature. Hence, constitutional government, a phrase that appeared in England in the 17th century, referred to both the actual frame of government and also a mode of conducting government that would accord with the principles of some fundamental source of validity lying outside the constitution itself. For some time during the 17th and 18th centuries the principles of kingship announced by the defenders of the Stuart monarchs stood in opposition to those announced by the proponents of constitutional government. Each rested its claim to authority on higher but different sources of validity.⁷¹ During the 18th century the authority of kingship was undermined, and the ensuing regimes were known as constitutional monarchies.

Constitutionalism, which first came into use in the early 19th century, was initially a term of opprobrium. In 1832, Robert Southey, then England's poet laureate, used it in disparagement of the radical reformers of his times. Gradually constitutionalism came to refer to the principles underlying that form of state in which kingship had been rendered subordinate to either constitutional principles, or, in some cases, to an actual written constitution. Republican regimes, most prominently those of America and France, originally resulted from the application of the principles of constitutional monarchy to a regime with an elected executive standing in place of a king.⁷² Although this substitution soon produced a new stage of constitutional thought, its assimilation took several decades. Mosca, writing well into the 20th century, underscored the traditional meaning by distinguishing between constitutional and parliamentary government.⁷³ The term constitutional was restricted to constitutional monarchy. Mosca's distinction was between governments in which the executive ministers did not resign when they were defeated in the legislature, but only through the action of the head of state (constitutional),

71. Frances Bacon was an exception, Wheeler, *The Constitutional Ideas of Francis Bacon*, 9 W. Political Q. 927 (1956), as was James I on occasion, CONSTITUTIONALISM, *supra* note 69, at 13.

72. Marshal MacMahon, on accepting the Presidency of France, made it clear that he regarded the Constitution of the French Third Republic as prolegomena to the restoration of a constitutional monarchy; Maitland referred to "those kingless monarchies on the other side of the Atlantic."

73. Mosca, *supra* note 6, at 261.

and those in which the ministers were appointed by the head of state but had to resign whenever they lost their majority in the legislature (parliamentary). He described America as a "presidential" form of government and appeared to classify it by analogy along with constitutional monarchies rather than with parliamentary governments.⁷⁴ Mosca argued that in parliamentary regimes specific constitutional safeguards might be eliminated while in constitutional monarchies, preservation of the King required preservation of the chartered limitations of his authority and also of constitutionalism. Hence, constitutionalism might be sacrificed if royal authority was completely eliminated. Perhaps he was reflecting the view of Sir Roger Twysden who, in the 17th century, wrote, "The world, now above 5,500 years old, hath found means to limit kings, but never yet any republicue." ⁷⁵ What Mosca called the "liberal" state came closest to the contemporary meaning of constitutionalism.⁷⁶

The pivotal figure for 20th century doctrines of constitutionalism is Otto Gierke,⁷⁷ the great historian of medieval Natural Law doctrines. Gierke flourished during the latter half of the 19th century. Romanticism was at its apex. Sociology—and socialism—were brash and lusty. Democracy was overtaking both constitutional monarchism and republicanism. Nationalism and imperialism were triumphant. Industrialization had grown into an institutional juggernaut. Science, as well as the fine arts, was laying foundations for spectacular achievements. And with all this came a magnificent explosion of historical scholarship without equal either before or after. Some of the most spectacular achievements were in medieval history, and in England, at least, one result was, in effect, a second "reception" of the Roman law. Savigny's history of Roman law⁷⁸ had paved the way. Sir Paul Vinogradoff's legal histories⁷⁹ later helped bring this home to a wider English audience, but it struck with special force because of the earlier work of Otto Gierke, whose *Das Deutsche Genossenschaftsrecht* was published in 1881. Gierke's work had an enormous effect on a brilliant group of English medievalists, the most prominent of whom was F. W. Maitland. In 1900, he had published an English translation of part of

74. *Id.* at 262-63.

75. Quoted in CONSTITUTIONALISM, *supra* note 69, at 138 (footnote omitted).

76. MOSCA, *supra* note 6, at 409-10.

77. GIERKE, *supra* note 44.

78. R. SAVIGNY, *GESCHICHTE DES RÖMISCHEN RECHTS IM MITTLEALTER* (1815-1831).

79. P. VINOGRADOFF, *VILLAINAGE IN ENGLAND* (1892); P. VINOGRADOFF, *ROMAN LAW IN MODERN EUROPE* (1909).

the third volume of Gierke's work under the title *Political Theories of the Middle Age*.

Maitland, though he never wrote explicitly about constitutionalism, was impatient equally with the narrow legalism that led from Bishop William Stubbs (whom he admired) to John Austin, and with the political empiricism which led from Hallam (the first to employ the term constitutional history) to Samuel Rawson Gardiner. Maitland's own researches had led him to plumb the mysteries of such things as the "Corporate Sole" and "The Crown as a Corporation."⁸⁰ However, Maitland's underlying concern with corporate institutions was motivated by an interest in what we now call constitutionalism. He believed, from historical research as well as constitutional conviction, that the Roman law "concession" theory of the authority of the corporation was wrong. This doctrine held that the corporation was a legal fiction and existed only by virtue of its legal creation by the state. The concession theory portrayed the corporation as an artificial contractual association rather than a natural, self-validating fellowship. Only the latter doctrine, in Maitland's view, furnished an autonomous foundation for the liberties, franchises and rights necessary to safeguard self-government. Gierke, employing the distinction between fellowship (*gesellschaft*) and association (*gemeinschaft*), had argued that while an association could result from a legal and contractual relationship between individuals, a proper self-validating fellowship, tracing to Germanic rather than Roman institutions, was a "real" collective person.⁸¹ Gierke developed the theory of the real personality of the group, an organismic idea that accorded both with Maitland's own constitutional convictions as well as with what he was discovering about English medieval institutions, especially the corporate form known as the trust.⁸² Following Gierke part way, Maitland argued that groups could be self-validating and were almost as real as a human being. Gierke provided him with a theoretical basis for the group realism he felt essential to constitutional theory.

Constitutionalism, the idea as well as the term, was central to Gierke's work. He was at pains to discredit the positive law associationist theory of the modern state, chief responsibility for which he visited upon Thomas Hobbes, and to resurrect a fellowship principle

80. 3 THE COLLECTED PAPERS OF FREDERICK WILLIAM MAITLAND 244-70 (H. Fisher ed. 1911).

81. GIERKE, *supra* note 44, at 81-82.

82. J. CAMERON, FREDERICK WILLIAM MAITLAND AND THE HISTORY OF ENGLISH LAW (1961); Stoljar, *The Corporate Theories of Frederick William Maitland*, in LEGAL PERSONALITY AND POLITICAL PLURALISM 20-44 (L. Webb ed. 1958).

of constitutionalism whose validity could be given a foundation independent of the authority of the state. Searching back through the then obscure doctrines of the medieval jurists, he discovered that they had developed a dualistic theory of the state that Gierke christened "Double Majesty."⁸³ This was the doctrine that people, as an organic entity, had always, during the middle ages, stood over against the king—an equal, if occasionally ineffective, participant in majesty (not sovereignty). While the medieval schoolmen had grounded these doctrines on Natural Law, Gierke saw behind that conception a lower case, prescriptive natural law which expressed the same sociological reality Maitland was to discover at the heart of medieval English institutions.⁸⁴ The explication, in one way or another, of the nature of this abiding institutional juristic substance, became the quest of the succeeding theorists of constitutionalism.

J. N. Figgis, Maitland's prize student, desiring to demonstrate an autonomous ground for the authority of the institutional Church, also drew heavily upon Gierke. Figgis' classic study of medieval constitutionalism was a description of how its leading doctrines emerged when the opponents of papal absolutism developed their theories of church government during the 15th century Conciliar Controversy.⁸⁵ Several of Figgis' contemporaries in England found his analysis applicable to other groups besides the Church.⁸⁶ This sociological-historical impulse stimulated the thinking that led to the great upwelling of constitutional theory that appeared in England after the 1920's. Figgis argued that the Church was not subject to domination by the state; the socialist intellectuals wanted to do the same thing for labour unions and other indigenous collectivities. In their hands the semi-sociological juristic strand of political philosophy drawn from T. H. Green's ethical philosophy of the state⁸⁷ was to issue in the theories of guild socialism that acquired vogue in England prior to the rise of fascism.

B. *The Positive State in England and America*

The practical aspects of this problem had come to a head over the

83. GIERKE, *supra* note 44, at 54-55.

84. Of course, Edmund Burke had previously written of England's "prescriptive" constitution, but Burke's Natural Law conception stands out in stark isolation in the late 18th century parliamentary debates. *Reform of Representation in the House of Commons*, in 6 WORKS 146 (1861).

85. J. FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS, 1414-1625*, at 41-61 (1923).

86. See, e.g., G. COLE, *GUILD SOCIALISM* (1920).

87. T. GREEN, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION* (1895).

advent of what by then had come to be called the positive, social welfare state. Its proponents were confronted with the necessity of accomplishing a delicate theoretical maneuver. The hallowed English constitutional tradition of the negative state that stemmed from Locke, and later the utilitarians, had been individualistic, positivistic, economic (if not materialistic) and somewhat anarchistic. As a result, the accepted theory of English constitutionalism seemed to be totally incompatible with the positive state required to institute collectivism. Modern constitutionalism had been born from the struggle against the Stuart mercantilists, and their doctrines had been in some ways similar to the collectivist ideas of England's 20th century socialists. Moreover, the Lockean tradition had been chaperoned through the closing decades of 19th century by liberal individualists such as Lord Acton⁸⁸ and Albert Venn Dicey,⁸⁹ who held fast to the central liberal political dogma of the limited state. They argued that the political core of constitutionalism was to be found in the rule of law restrictions of governmental action. Anything that undermined this central tenet—such as collectivism, the positive state and even administrative law—was anathema.

While the reformers acknowledged the crucial importance of the rule of law, they objected to interpretations that made it appear inimical to social reform. In the United States, somewhat later, these issues were fought out before the Supreme Court during the 1920's and 30's. But this resolution was impossible in England. Anything an English Parliament might decree was, from a legal standpoint, constitutional, and no appeal lay to the courts. Hence, English opponents of the new socialist proposals could not charge that they were unconstitutional at English law. The absence in England of judicial review of the constitutionality of legislative enactments forced the argument out of the technical realm of constitutional law and into that of general constitutional theory. This specific characteristic of the English Constitution ultimately forced both sides of the argument to enunciate the underlying principles of constitutionalism. This lot fell to the contending academic polemicists of the day, and as a result of their writings constitutionalism became the central concept in political theory for more than a generation.

The neo-liberal collectivists such as T. H. Green and Maitland countered the orthodox liberal individualists by reaching beyond Locke

88. J. ACTON, LECTURES ON MODERN HISTORY (1907).

89. DICEY, *supra* note 3.

and the 17th and 18th century English empiricists into continental idealism on the one hand and medieval constitutionalism on the other, attempting thereby to undermine the enormous authority and prestige of the solid English constitutional tradition upon which the orthodox liberals drew. Gierke, with his unrelenting attack on individualism, as well as his doctrine of the reality of the corporate group person, was perfectly suited to their needs. If Gierke had not existed, Maitland and Figgis would have been hard pressed to invent something comparable, solely out of indigenous English materials. Gierke permitted the neo-liberal socialists to ignore the august tradition that stemmed from Locke and answer the stand-pat rule of law orthodox liberals by resurrecting a hallowed and immemorially constitutionalist English law derived from ancient charters and constitutions rather than 17th and 18th century individualists. The rule of law was not ignored, but its true sources were attributed to English constitutional conventions much more ancient than the Glorious Revolution. These traditional conventions of the constitution were alleged to be even more important than the legalistic doctrines of individualist liberalism. They insured that English government, even should it become socialist, would continue to observe traditional English rights and liberties. Hence the reformers concluded that the positive social welfare state was demonstrably compatible with the deeper meaning of English constitutionalism.

Ernest Barker,⁹⁰ also a Maitland disciple, and A.D. Lindsay⁹¹ consolidated the tenets of the requisite political theory. Harold Laski⁹² levelled a devastating attack against orthodox individualistic liberalism. W. Y. Elliott, writing under a heavy indebtedness to Green and Lindsay, attempted to Americanize the philosophic side of the argument, translating the English academic war against empiricism into one against pragmatism, the American counterpart of which was then, under John Dewey, running at high tide.⁹³ Elliott's *Pragmatic Revolt in Politics* contains more copious references to constitutionalism than had previously appeared in print anywhere.

However, one result of this Americanization of the English debate was to impose an "Anglican" version of unwritten, conventional constitutionalism upon the heavily juridical and formalized constitutional

90. E. BARKER, *REFLECTIONS ON GOVERNMENT* (1942).

91. A. LINDSAY, *THE MODERN DEMOCRATIC STATE* (1947).

92. H. LASKI, *A GRAMMAR OF POLITICS* (1967).

93. W. ELLIOTT, *THE PRAGMATIC REVOLT IN POLITICS* (1928).

structures that were so characteristically American; an effectual anglicization of American constitutionalism. Of course, an Anglican doctrine had a distinguished lineage reaching back through Abbott Lawrence Lowell and Woodrow Wilson to Hamilton and Washington.

Benjamin F. Wright, Elliott's colleague at Harvard, completed the Americanizing maneuver. Starting with the early New England divines and relying heavily upon John Adams, he attempted, with only partial success, to demonstrate the existence of an ongoing Natural Law theme lying at the heart of the American constitutional tradition.⁹⁴ C.H. McIlwain, scion of distinguished Harvard tradition that had long advocated the adoption in America of a version of England's parliamentary system, was also a medievalist in the Maitland mold.⁹⁵ McIlwain did not publicly enter the debate over constitutionalism until the 1930's. By that time the appearance of fascism had shifted the argument over constitutionalism to a new plane. Fascism relied upon organismic theories of the state, and this fact alone went far toward discrediting Gierke's theory of the real personality of the group.

[T]he recent appalling effects of tribal particularism have served to heighten the suspicion held by some of us a good while before, that after all the impressive apparatus of Gierke's *Genossenschaftsrecht* sometimes merely conceals the weakness of some of its principal historical conclusions instead of really strengthening them. The too ready acceptance of these conclusions by F. W. Maitland, the greatest of all our modern historians of English medieval institutions, unfortunately created a vogue in England and America for these views which a careful examination of them seems hardly to justify.⁹⁶

Early studies of fascism had indicated that in Italy and Germany constitutionalism had been undermined by the creation of a "second state" that was anti-constitutionalist and which, while leaving the formal structure of the old state standing, subverted it by creating a second, totalitarian regime that, when superimposed upon the old state, was able to substitute its anti-constitutionalist "people's law" for the traditional constitutional law, rendering the latter unable to forestall the spread of Nazi terror.⁹⁷

Fascism directed the attention of the neo-liberal constitutional theorists back to the rule of law tradition. The task now was to

94. B. WRIGHT, *AMERICAN INTERPRETATIONS OF NATIONAL LAW* (1931).

95. C. McILWAIN, *supra* note 2.

96. CONSTITUTIONALISM, *supra* note 69, at 44; *see id.* at 91.

97. E. FRAENKEL, *THE DUAL STATE* (E. Shils, E. Lowenstein & K. Knorr transl. 1941).

incorporate it into a doctrine of constitutionalism for a positive, social welfare state freed from organismic foundations without, however, capitulating to orthodox individualistic rule of law liberalism. There were two problems. First, to give the strict observance of the rule of law a more central position than Maitland, Figgis, *et. al.* had allowed, without capitulating to the anti-collectivist bias of the powerful juristic tradition stemming from Locke. Second, however, to lodge its foundations in pre-liberal, pre-individualist English constitutional traditions without relying upon the noxious doctrines Maitland and his followers had borrowed from Gierke.

McIlwain's solution was to identify constitutionalism with the higher law and the *vox populi* traditions. The latter could then be distinguished from the noxious *volksgeist* which had come into such disrepute in Nazi Germany. In his survey of historical precursors, he ignored Greek analysis of formal constitutional structures, concentrating instead on fragmentary statements about the higher law drawn from Plato's *Statesman*. McIlwain argued that "modern" constitutionalism had originated in Rome. But not in the familiar mixed state doctrines of Polybius and Plutarch; rather, in the stoic doctrines of law found in Cicero, Seneca and the *Institutes* of Justinian.

In the final pages of his impressive study McIlwain made his own stand clear even though he denied that the preceding survey permitted him to "deduce any strict definition of constitutionalism."⁹⁸ It turned out that medieval Englishmen had been on the right track. Medieval constitutionalism, said McIlwain, rested upon the distinction between *jurisdictio* and *gubernaculum*. *Jurisdictio* referred to the way in which official action was performed: the formal procedures of a proper monarchy. *Gubernaculum* referred to the substantive aspects of government in a monarchy. McIlwain held that this doctrine of medieval kingship is applicable to modern constitutionalism.

The reconciliation of these two remains probably our most serious practical problem. . . . There is the same necessity now, as in ages past, to preserve these two sides of political institutions intact . . . and to guard against the overwhelming of one of them by the other.⁹⁹

However, modern Englishmen had done better than their medieval forebearers by two maneuvers. In the first place, they brought the procedural aspects of *gubernaculum* under *jurisdictio*, under, that is, the rule of law, guaranteed by an independent judiciary. In the second

98. CONSTITUTIONALISM, *supra* note 69, at 135.

99. *Id.* at 139.

place, they lodged the source of the validity of *gubernaculum*, as well as control over its substantive actions, in the people acting through democratic processes. McIlwain perceived that the maintenance of constitutionalism requires both that popular institutions, and the rule of law, be kept vital. But the institutional sources of vitality in which he trusted were unconvincing: a British-type party system and an independent judiciary. Yet that was about the way McIlwain summed it all up, adding to his imprecations against Gierke the admonition to avoid a typical American pitfall. Separation of powers and other such peculiarly American appurtenances of the 1789 Constitution, he warned, are irrelevant to constitutionalism: "Among all the fallacies that have obscured the true teachings of constitutional history, few are worse than the extreme doctrine of the separation of powers and the indiscriminate use of the phrase 'checks and balances.'"¹⁰⁰ The reason follows from the thesis: such devices do not ensure the maintenance of popular controls and they are irrelevant to insuring an independent judiciary. Indeed, "the doctrine of the separation of powers," McIlwain pronounced, "has no true application to judicial matters,"¹⁰¹ despite the contrary opinions of certain "closet philosophers like Montesquieu."¹⁰²

McIlwain performed an astounding *tour de force*. Laying down what was to become acclaimed as the bible for all succeeding theorists of constitutionalism, he purported to display the essence of the topic and did so while scarcely mentioning the classical liberals such as Locke and Montesquieu and without carrying his essential story beyond England of 1630. The time honored staples of the constitutional theory of the rule of law, such as the mixed state, separation of powers and checks and balances dropped completely from sight and with them any special American (or French) claim to having contributed to modern constitutionalism. The extent to which their politics partook of the virtues of constitutionalism was measured by their degree of adherence to the formula derived from Gothic England. Anything else was superfluous. The scholarship was impressive and the style magistral, but the dilemma McIlwain posed was disturbing. His doctrine made the rule of law and the positive state compatible with modern constitutionalism in England, but nowhere else. It bestowed laurels upon one or two Romans, a few obscure medieval jurists and Sir Edward Coke but dismissed cavalierly Aristotle, Polybius, Bacon,

100. *Id.* at 141.

101. *Id.*

102. *Id.* at 142.

Harrington, Hobbes, Locke, Montesquieu, Rousseau, Jefferson, Adams, Madison, Hamilton and Calhoun. McIlwain as much as stated that if the Americans wished to install a positive state and also enjoy the blessings of constitutionalism they would have to forget the structural preoccupations of the Founding Fathers and all those features that distinguished the American from the English constitutional tradition.

Francis Wormuth set about to redress the imbalance in a brilliant study which, while not ignoring the medieval materials, reestablished the more familiar linkages between the rule of law, constitutionalism and the structuralist tradition which reached from the mixed state of antiquity to the separation of powers doctrines of modern times. In order to put these all back together again, it was necessary to resume the story where McIlwain had left off, namely, with the mid-17th century English Civil Wars. That was where most of the specific devices and ideas that characterize modern constitutionalism found expression—the written constitution, separation of powers, checks and balances, bicameralism and judicial review. However, these were not without their own resonances in ancient and medieval times. So once the ancient origins and the 17th century inventions were restored to what Wormuth believed to be their proper places, it was possible for him to supply the connective tissue for making a juncture between the general theory of constitutionalism and the more special tradition of American constitutionalism.¹⁰³

The central problem of constitutionalism, said Wormuth, was that stated by Madison in *The Federalist*: “[F]irst enable the government to control the governed; and in the next place to oblige it to control itself. A dependence on the people is, no doubt, the primary control on government; but experience has taught mankind the necessity of auxiliary precautions.”¹⁰⁴ To these auxiliary precautions, Wormuth continued, “we give the name constitutionalism.”¹⁰⁵ Hence, one of the essentials McIlwain relied upon in describing the modernization of medieval constitutionalism, namely, the bringing of *gubernaculum* under popular control, is separated from the more specific architectural principles that underlie constitutionalism. Two kinds of devices are concentrated upon. One is the protection of “substantial interests from governmental encroachment.”¹⁰⁶ This referred not only to the protec-

103. WORMUTH, *supra* note 48, at ix.

104. *Id.* at 3, *quoting*, THE FEDERALIST No. 51, *supra* note 66, at 348.

105. *Id.*

106. *Id.* at 3-4.

tion of property but also the protection of the civil rights so prominent in the American view of constitutionalism. This provides the basis for doctrines of toleration and pluralism that have occupied the attention of so many American political scientists.¹⁰⁷ Wormuth gave high prominence to the separation of powers and checks and balances so repugnant to McIlwain. They helped guarantee the rule of law which Wormuth described as the "persistently recurring idea of the character of law," generality and prospectivity¹⁰⁸: laws should affect all equally and they should refer only to the future.

Wormuth's summary was:

If law is to be general and prospective in character, it is improper for the legislative power to deal with particular cases. The temptation to improvise a special rule may prove too strong. Likewise, it is improper for the executive power, which applies rules to individuals, to possess legislative power, for once again persons may be deprived of the advantage of known and settled rules. Among arguments for separating the legislative and executive functions, these were perhaps the most cogent.

The doctrine of separation of powers was immediately assimilated to the mixed monarchy, with the king in the role of independent executive; a second balance, that of legislature against executive, was added to the conventional balance of king, lords and commons. Here we have most of the elements of modern constitutional thought.¹⁰⁹

Wormuth, it is clear, is poles apart from McIlwain. His is a structuralist analysis of the rule of law. It suggests that constitutionalism rests upon certain formal institutional arrangements and procedures which, if instituted and maintained, can go a long way toward guaranteeing the protection of certain crucial interests: the safeguarding of procedural due process of law, and the guarantee that laws will possess the proper characteristics. To make his case required going back over the terrain McIlwain had covered in search of an alternative explanation of the Gothic formula McIlwain had uncovered. Not surprisingly, he took a second look at Maitland and the feature McIlwain had rejected: Gierke's analysis of medieval constitutionalism. Ignoring the real personalty of the group doctrine that had appealed to the Maitland school, Wormuth concentrated on Gierke's conception of Double Majesty, alleging that it furnished the proper interpretive meaning of the medieval doctrines of kingship McIlwain had studied. Double Majesty was the proposition that medieval kingship had been dualistic rather

107. D. HANSON, FROM KINGDOM TO COMMONWEALTH 336-73 (1970).

108. WORMUTH, *supra* note 48, at 4.

109. *Id.* at 8-9.

than unitary. Previous theories of constitutionalism, save that of Gierke himself, had ignored it completely. Double Majesty held that medieval kings had possessed a sphere of absolute power, but alongside it was a separate sphere in which they were under the law. During the 17th century stresses between these two partners developed and finally become intolerable. Toward the end of the century the dualistic medieval constitution was overthrown in favor of something more akin to ancient conceptions of jurisprudence and mixed monarchy. Here Wormuth challenged McIlwain directly. In Wormuth's analysis, the *dominium regimen et regale* of Fortescue, as well as the other English texts seized upon by McIlwain, were all evidences of the medieval Double Majesty which pertained to kingship, narrowly conceived, rather than to anything compatible with the modern state, and hence could not provide the foundation for the modern rule of law tradition. Indeed, claimed Wormuth, that earlier dualism was precisely what was overthrown by modern constitutionalism, and the crucial maneuver came in the mid-17th century when "commonwealth," or national civic consciousness (citizenship), supplanted "kingdom" and personal loyalty to the king (allegiance).¹¹⁰

Wormuth's work permitted revalidating the significance for constitutionalism of the governmental schemes of the early 17th century proto-liberals who had drawn up the Cromwellian constitutions. Especially prominent in his story is James Harrington, who was so deeply admired by John Adams, as well as by many other architects of the American Constitution. But Wormuth's work also resurrected Hobbes, Locke, Montesquieu and the classical liberals who had labored so arduously over the structural principles of constitutional government. This was precisely the tradition that McIlwain, in ignoring it completely, had implicitly discredited.

C. *The Contemporary Debate*

We cannot avoid seeking for the truth of the matter. It is not merely a question of resolving the intricate issues of historical interpretation in dispute in these two doctrines of constitutionalism, though this is a matter not to be dismissed lightly. The crucial matter is to find out whether or not there is anything that is distinctive and also valid about the tradition out of which American approach to constitutionalism developed. McIlwain and other "Anglicans" say no, and Wormuth and the "Americans" say yes. This became a pressing contemporary problem because of the American constitutional crisis that emerged during

110. D. HANSON, *FROM KINGDOM TO COMMONWEALTH* 30-40 (1970).

the Nixon administration. For the scholars who offered remedies to correct those evils found themselves, often unwittingly, coming to opposition over issues that were contemporary counterparts of the opposing interpretive traditions represented by McIlwain and Wormuth. On the one hand are the "Anglican" constitutional theorists like Samuel H. Beer. Beer, reasoning as had McIlwain, argued that Americans should not tamper with the basic governing structure that has evolved in recent years. Specifically, they should not whittle away at the structure of the Presidency and should not succumb to the dangerous delusion that somehow Congress can be made to reassert a nostalgically imagined congressional activism designed to reactivate the separation of powers mechanism that has fallen out of balance through the growth of executive power. On the contrary, argued Beer, the contemporary solution must be sought in the strengthening of the party institutions permitting the resurgence of the political side of the dualistic balance between people and government;¹¹¹ a view in harmony with the way McIlwain had modernized Gothic *jurisdictio* and *gubernaculum*.

On the other hand were the "Americanists" like Arthur Schlesinger, Jr.,¹¹² and Arthur S. Miller,¹¹³ who concentrated upon the structural imbalances that have grown up between Congress and the Presidency. They advocated rearrangements capable of mediating between the two. Of course, numerous other structural innovations, usually designed to strengthen Congress, became the common currency of the debate unleashed by Watergate. However, it is apparent that the issue cannot be resolved until we settle upon a sound theory of constitutionalism.

Suppose we restate the issue. On the one hand, constitutionalism is viewed in the context of an on-going dialectic between people and power. The substance of power is controlled by democratic institutions; the forms of the exercise are controlled by an independent judiciary. According to this view, the problem of constitutionalism is to facilitate the expression of popular will through electoral institutions so that government will always operate in the public interest; the maintenance of an independent judiciary will force government to function in accord with the precepts of the rule of law.

Such, at least, is how I interpret McIlwain's formula. But his modern English application of the doctrine appears to founder on the same dif-

111. Beer, *Government and Politics: An Imbalance*, 7 THE CENTER MAG., Mar.-Apr., 1974, at 10.

112. A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

113. Miller, *Separation of Powers: An Ancient Doctrine Under Modern Challenge*, 7 THE CENTER MAG., Mar.-Apr., 1974.

ficulty that had flawed its medieval predecessor: What force would make the system operate according to the formula? What makes it proof against Harrington's claim that it is a form of gunpowder rather than government? This is the way it has turned out in fact in most modern constitutional democracies. In discussing this problem under the conditions of the 14th century McIlwain had insisted that medieval English kings were "absolute without being arbitrary." But the force that kept them from being absolute eluded his rationalist approach. The barons, exercising a direct form of civil disobedience, acted as a regulative force from time to time. Runnymede was the celebrated example. However, the barons were no more governed by a built-in constitutional morality than were the kings. At one point McIlwain hinted obscurely at some yet to be uncovered coronation oath that would somehow validate his thesis. Yet, as we have seen earlier, his reference to civil disobedience was a pregnant one; at various places he opined that constitutionalism was little more than the "institutionalization of civil disobedience." This aspect of constitutionalism has been given scant consideration in comparison to the attention that has been lavished upon the rule of law. Usually, refuge is taken in the modern political party. The preferred example is the English system of programmatic parties as they functioned prior to the English cabinet crisis of 1931.¹¹⁴ However, with party systems now in disarray everywhere, including England, this aspect of constitutionalism requires renewed emphasis.

Consider again McIlwain's statement of the modern formula, which on one side rested upon an independent judiciary. It is true in principle that an independent judiciary might be capable of subjecting issues arising from the exercise of governmental authority to the rule of law. But it would have to want to do so, and some outside force would have to preserve its jurisdiction. Corruption could confound the first, and measures like those that Hitler adopted for his terroristic people's courts could undermine the area in which the rule of law applied. It is by no means a fail-safe formula, and this in part accounts for the recurrent effort others have made to identify constitutionalism with a special regulative architecture of governmental functions as exemplified in the American Constitution. These theorists continue the argument from the point where McIlwain left off.

Popular institutions plus an independent judiciary are necessary but not sufficient. They were essential to the creation of the modern state;

114. H. WHEELER, *THE CONSERVATIVE CRISIS, ENGLAND'S IMPASSE OF 1931* (1956).

but something more than these is required to tame it. Moreover, it is incompatible with the requirements of constitutionalism to leave the people and the government standing side by side, as had been the case prior to the introduction of constitutions with formal mechanisms to control the exercise of governmental authority.

Such a dualism takes us no further than medieval Double Majesty. Gierke pointed out that it was the inability to resolve this dualism that had confounded medieval constitutionalism. That was the problem both Locke and Rousseau attempted to resolve through their different versions of contract theory. But the true foundation, they insisted, lay in the right to revolt, and nobody succeeded in incorporating revolution into constitutionalism. The solution lies with the lead explored earlier: the institutionalization of civil disobedience. Its indispensability was reinforced by the lessons of Watergate.

V. THE REINSTATEMENT OF CIVIL DISOBEDIENCE

A. Introduction

As the Watergate crisis came to a head, it became apparent that many of the worst constitutional abuses of the Nixon Administration were motivated by a fear of the protest movements of the late 1960's. In this context Ehrlichman and others appealed to the doctrine of national security and claimed that it justified all the constitutional improprieties that had occurred: the Huston plan for instituting a presidential secret police, the Ellsberg break-in, Watergate itself and the attempt to provide it with a C.I.A. cover, and the extensive C.I.A. surveillance violations of individual privacy.¹¹⁵ The leaders of the Nixon Administration testified that they regarded the protest movement as a threat to national security with links to the nation's foreign ideological enemies. While there was no evidence of traitorous conspiracy, some of the protests were violent and the excesses of these few tended to discredit all protests and demonstrations, most of which were quite peaceable applications of civil disobedience.

Mass civil disobedience, understandably enough, is rather frightening. It calls to mind riots and mobs, and these, like fire storms, strike terror into the soul. Yet, as we have seen, civil disobedience also possesses a hallowed status in political history. Magna Carta and the Declaration of Independence are ready examples. Both, however, were

115. See C. BERNSTEIN & B. WOODWARD, *ALL THE PRESIDENT'S MEN* (1974).

masterminded by men who were rich and powerful, and this fact tends to make such protests more acceptable, at least in retrospect, than similar actions taken in the present by poor people. However, in principle, there should be no difference at all, for the two component parts of constitutionalism, the rule of law and democracy, often appear to be incompatible partners; popular demands sometimes conflict with rule of law procedures. Our apprehensiveness is not lessened merely because McIlwain has left us with a handy dictum.

Civil disobedience implies that the people must have the capability of deposing a government they regard as noxious. Constitutionalism implies that the capability for doing so must be institutionalized and protected. Under the British Constitution, this was translated into the party-based capability of triggering a cabinet crisis and dismissing the government of the day. Hence the conclusion that British parliamentary constitutionalism rests in part upon the ability to force a crisis upon an errant government and then resolve it through a resort to popular processes. However, this ability to produce and resolve administration crises, so prominent in the best of Europe's parliamentary democracies, was never incorporated into the American "presidential" form of constitutional democracy. This was the feature of the Watergate crisis that so perplexed Europeans. How could an administration that committed so grave a crime be permitted to stay in office, they asked? But in the United States, administrations can be deposed only at quadrennial intervals, regardless of the fact that an administration, such as that of Richard Nixon, may be found deficient at the start of its term.

This underscores the fact that although European constitutional traditions center around institutionalized methods for bringing about and resolving governmental crises, no such capability exists in the United States, and this is the greatest structural defect of our present constitution. Initially, as Hamilton, Madison, Jefferson, and Calhoun pointed out, our form of federalism, and the concomitant exercise of States' Rights, offered some possibility confronting the central administration with a crisis. "The true barriers [defenses] of our liberty in this country," Jefferson wrote in 1811,

are the State governments; and the wisest conservative power [of liberty] ever contrived by man, is that of which our Revolution and present government found us possessed. Seventeen distinct States, amalgamated, regularly organized . . . [by] the choice of a free people, and enlightened by a free press, can never be so fascinated by the arts of one man, as to submit voluntarily to his usurpation. Nor can they be constrained to it by any force he can possess. While that may

paralyze the single State in which it happens to be exemplified, sixteen others . . . rise up on every side ready organized for deliberation by a constitutional legislature, and for action by their governor, constitutionally the commander of the militia of the State.¹¹⁶

He recognized that this doctrine courted "scission." And while this was strong medicine, it was also the cure of hardy patriots: "[C]ertain States might attempt to secede from the Union. This is certainly possible, and would be befriended by this kind of regular organization [i.e., federalism]. But . . . if they should ever reach the majority of States they would then become the regular government"¹¹⁷

Jefferson argued that it was the absence of this kind of federalism in post-revolutionary France that explained its progression toward centralized dictatorship and terror: "The republican government of France was lost without a struggle because the party of '*un et indivisible*' had prevailed; no provincial organizations [read state sovereignty] existed to which the people might rally under authority of the laws."¹¹⁸ However, in America that form of institutionalized civil disobedience was eliminated following the Civil War. Watergate revealed that there is a pressing need for us to find an alternative way to force and resolve administration crises.

It may be replied that Nixon ultimately *was* forced out of office, and that is true. But the strenuous and prolonged national trauma that was required to bring this about underscores the European query. In Europe the deposition of a government grew out of early impeachment practices. In the American constitutional setting, however, impeachment is a terminal affliction rather than a ready remedy. To have applied it to President Nixon would have threatened to destroy rather than vitalize the constitutional system. In the end, its probable side effects prevented its utilization. The degree of constitutional catastrophe that the resort to impeachment threatened to unleash was sufficient to render it unavailable. Moreover, but for the quirk of personality that led Richard Nixon to institute his secret tape recordings, doubtless he would have weathered the storm that gathered about himself. Even then, other fortuitous accidents were also required: that particular Judge Sirica rather than some other; Woodward and Bernstein at that particular newspaper, happening onto the particular "Deep

116. Letter from Thomas Jefferson to Monsieur Destutt De Tracy, Jan. 26, 1811, in 13 THE WRITINGS OF THOMAS JEFFERSON 19 (A. Libscomb ed. 1905) [hereinafter cited as JEFFERSON, WRITINGS].

117. *Id.* at 20-21.

118. *Id.* at 20.

Throat" who provided them with critical leaks at critical junctures. With such accidents necessary to even bring the impeachment crisis to a head, and then to find it too constitutionally disruptive to apply, does not testify very effectively to the health of the institutionalization of civil disobedience in contemporary American constitutionalism. However, in the beginning—in 1789, that is—things were different.

The designers of the 1789 Constitution were talented, almost to a man, but they were also lucky, and this is not always given its proper due. They were not working from scratch, and they were not spinning gossamer institutions out of airy theories. They were essentially writing into fundamental law functional principles derived from the British constitutional tradition after making corrections for abuses here and there. They substituted republican for monarchical authority; they invented federalism, ostensibly to supplant the unifying authority of the imperial crown and then added quickly the judicial review they had pled for when oppressed by what James Wilson earlier called "unconstitutional" parliamentary decrees. There was more to the story: how they converted British parliamentary supremacy into the separation of powers checks and balances principles. But even here, though the doctrinal steps in the process are intricate to unravel, the resulting mechanism fell out quite naturally from the effort to republicanize the concentrated imperial authority of the sovereign British King-in-Parliament. The balances of powers checks and balances conversion was an enormously successful *tour de force*, but the maneuver was not cost free. What was sacrificed, along with ministerial responsibility to Parliament, was the ready ability to dislodge a corrupt, incompetent or unpopular administration. For one constitutional lesson from the Nixon administration is that impeachment is at once so complex and so grave, as to virtually foreclose its availability for anything less than a catastrophic crisis. But a government unable to make emergency alterations short of a catastrophe is, in a sense, dependent upon catastrophe—or revolution—for meeting extraordinary crises. This is the essential structural weakness of the 1789 Constitution. It assumes, in effect, that governmental crises will cooperatively arrange their appearances so as to coincide with the preordained quadrennial periodicity of national presidential elections. This was a fateful error, but it was not an oversight. The founders thought federalism would solve the problem.

The result was to deprive the Constitution of its built-in basis for the development of a republican analogue of what later in Europe be-

came the cabinet crisis. Sir Robert Twysden¹¹⁹ and Gaetano Mosca¹²⁰ had hit upon an important point of constitutional wisdom. For aside from the American Constitution in the era reaching from Jefferson to Lincoln—and Switzerland, perhaps—no republic has yet discovered a surrogate for the ministerial crisis that developed out of European constitutional monarchies. There is a neat piece of constitutional logic involved in this issue and it dates back to Locke and Rousseau, and other such constitutional engineers so disdained by Charles McIlwain. Locke's two contracts defused the gunpowder in medieval Double Majesty by establishing first the priority of the social contract and then a subsidiary contract of government that could be abrogated from time to time through ministerial crises without rupturing the complete fabric of society. However, modern republican regimes have failed to observe the imperatives contained in this architectonic idea. They have produced instead kingless versions of medieval Double Majesty: de-royalized replicas of *regimen politicum et regale*,¹²¹ republicanized gunpowder, and nearly all of them have already blown apart.

In England, the responsibility of the cabinet to parliament was not established until midway through the 19th century. In America the Jeffersonian republicans devised a solution appropriate for a republic that was also a federation. This led to the characteristic feature of Jeffersonian constitutionalism.¹²² Jefferson feared the young republic was being transformed into a dictatorship by the "monocrats." At that time the distinction between a constitutional republic and a dictatorial one had not yet been developed. In Jefferson's view that distinction had to be founded upon the preservation of institutionalized capacities for exercising effective civil disobedience that could force an errant administration to its knees through the actions of an aroused populace. The states, he held, were the vehicles of popular remonstrances against elitist dictators like Hamilton and also the stabilizing guarantors against the excesses of French style terroristic dictatorial demagogues like Marat.

The Alien and Sedition acts brought these issues to a head. The Jefferson-inspired Kentucky and Virginia resolutions answered the Hamiltonian threat in precisely the above terms. The states, read the Kentucky resolution, had

119. See note 75 *supra*, and accompanying text.

120. See Mosca, *supra* note 6.

121. CONSTITUTIONALISM, *supra* note 69, at 87.

122. Jefferson to Eldridge Gerry, Jan. 26, 1799, 10 JEFFERSON, WRITINGS, *supra* note 116, at 76-79.

by compact under the style and title of a Constitution for the United States and of amendments thereto . . . constituted a General Government for special purposes, delegated to that Government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-government; and that whensoever the General Government assumes undelegated powers, its acts are unauthorized, void and of no force . . .¹²³

Ante bellum republicanism held the Preamble to the Constitution to read: "We, the people of the States, United"

This was the doctrine over which Jefferson waged the election of 1800. Popular ratification gave him the victory that he celebrated as the "political revolution of 1800."¹²⁴ Its claim to the status of a revolution rested upon the fact that it guaranteed that the United States government would operate as a constitutional instead of a dictatorial republic, and Jefferson, with good reason, regarded this as an historical first of great moment. The election insured this by confirming the states as the repositories of institutionalized civil disobedience. So they remained for over half a century until the legacy of Reconstruction was to make Richard Nixon the remote beneficiary of the humanitarian stand taken by the Great Emancipator; the re-feudalized Constitution instituted by the Radical Republicans issued ultimately in the Watergate crisis. For the constitutional issues brought to a head as a result of the excesses of the Nixon administration are direct counterparts of those that characterized the constitutional crisis that arose as a result of the machinations of Inspector General Hamilton.

Today we think of federalism only as an archaic device for distributing authority between the general government and the States. Initially, however, it provided for a large measure of State autonomy. The States, as organized political communities, stood between the general government and the citizen. On the one hand they could operate as a negative check to protect citizens from arbitrary actions by the general government; on the other hand they could be a positive agency for the expression of mobilized citizen power: hence the justification for describing federalism as one way in which civil disobedience was institutionalized in the early republic.

Jefferson casually assumed that Americans were just naturally the sort of liberty loving creatures who would pull off a revolution every generation or so. Jackson, Calhoun and all patriots up to the end of the

123. Sisson, *supra* note 68, at 293-94.

124. See H. WHEELER, *THE CONSERVATIVE CRISIS* 111-19 (1971); Sisson, *supra* note 68, at 343.

Civil War made the same assumption, and they were right until Gettysburg. For the Civil War ended more than confederate state sovereignty. It also dampened the congenital American impulse to rebellion and stilled the civil disobedience safety valve our Founding Fathers had not otherwise written into the Constitution. The imperative need for unity at all costs, and the centralizing arrangement that served this need, deprived the Constitution and its adherents of the leverage the Jeffersonian Republicans thought they had deposited for all times in the hands of the people. America has never really recovered from the Civil War, and there were many aspects of it she very well should *not* recover from. But she also, in shedding the bad, sacrificed along the way her chief built-in provision for the constitutionalization of civil disobedience. If Watergate, in its deeper meaning, teaches us no more than the need to reconstitutionalize an appropriate contemporary form of civil disobedience, it will have been a *felix culpa*; a fortunate fall, for the conclusion that follows from the foregoing analysis is that civil disobedience is the father, not the ward, of civil liberty; it is prior to rather than derivative from first amendment freedoms.

After the Civil War federalism ceased to operate as a device permitting the states to check the federal government as a whole. Long before Watergate the separation of powers had succumbed to the engrossment of authority by the presidency. By the 1950's the two party system had hardened against popular dissent and rendered virtually impossible a repetition of the Jeffersonian and Jacksonian protests that had led to the modern political party. The media of communications, taken overall, functioned in support of the government rather than as the vigilant voice of conscience which initially had entitled them to their chartered liberties. The result was to undermine the autonomies of previously independent centers of authority. The federal government, under the hegemony of the presidency, acquired a monopoly of power. The Supreme Court, subject to indirect influence through presidential appointments, was an unreliable protector of civil disobedience.

As we have seen, although British constitutionalism derived from impeachment proceedings, in the United States the impeachment process failed to issue in an institutionalized method for dealing with crisis; our own form of constitutionalism remains dependent upon more primitive forms of civil disobedience.

B. The Constitutional Theory of Civil Disobedience

There is a basis in American constitutional theory for remedying this defect. Indeed, protection for civil disobedience is not only required

by the principles underlying the first amendment, but also rests upon at least as solid constitutional grounds as does the practice of judicial review. Indeed, the protection of civil disobedience is essential to the maintenance of an evolving constitutional order whose emerged principles are developed through the interpretations of a Supreme Court.

This, of course, is the issue that arose in Weimar Germany, and ever since we have pondered the proper antidote should a threat similar to that posed by Hitler again arise. Many Americans believe the nation is now threatened with a neofascist subversion of the principles of the Constitution and that this can be forestalled only through determined acts of civil disobedience.

In the 1960's Francis Wormuth demonstrated that President Johnson's waging of the Vietnam war was an usurpation of authority in violation of the Constitution.¹²⁵ Frank Harvey showed that the Vietnam war was waged in violation of the Nuremberg prohibitions of crimes against humanity.¹²⁶ Paul Jacobs depicted—if more than the morning newspapers were needed—the extent to which the cities have decided to “solve” the problems of their ghettos by storm troop methods.¹²⁷

The radicals and activists of the 1960's did not, before storming into the streets, sit down first and ponder the principles of constitutional theory, although the numerous campus “teach-ins” did emphasize the constitutional issues involved. The radicals resorted to direct action in their opposition to official immorality and invoked in their self-defense a higher constitutional morality. The civil disobedience of those days was consistent with the principles that had been at issue for over five hundred years in history's greatest constitutional struggles. However, it must be borne in mind that the American Constitution was drafted prior to the advent of democracy. It institutionalized forms of civil disobedience that had been pioneered by social elites but not those of the people. This task of bringing constitutionalism abreast with the historical achievement of popular democracy still remains to be accomplished. Its urgency was demonstrated by Watergate and the national security basis for repressing popular demonstrations it exposed. It does not suffice to argue that the Supreme Court has in the past up-

125. Wormuth, *The Vietnam War: The President Versus the Constitution*, Center for the Study of Democratic Institutions, (Center Occasional Paper, vol. 1 No. 3, 1968).

126. Harvey, *Air War in Vietnam* 79 *FLYING* 38 (Nov. 1966).

127. Jacobs, *The Los Angeles Police: A Critique*, 227 *ATLANTIC MONTHLY* 95-101 (Dec. 1966). See also P. JACOBS, *PRELUDE TO RIOT: A VIEW OF URBAN AMERICA FROM THE BOTTOM* (1966).

held the constitutionality of many mass demonstrations for a differently constituted Court could rule the other way.

What is the remedy when the official political institutions as a whole operate despotically? The Constitution's built-in devices for checking tyranny fail to function, the individual citizen is left without a champion, and issues come to depend upon individual acts of resistance. But under what principle can the needed—the constitutionally required—acts of individual civil disobedience be defended? It is clear that the *theory* of constitutionalism supports and defends civil disobedience—there would be no such thing as constitutionalism without it.¹²⁸ But does it follow that mass civil disobedience is protected by constitutional law?

Reason dictates that anything required in constitutional theory ought to find recognition in constitutional law. But if that is the case, how could one state the principle of constitutional law protecting civil disobedience? In the first place, according to the theory of constitutionalism, all acts of civil disobedience should have an *a priori* claim to protection under the first amendment. Beyond this, however, the primacy of the principle of civil disobedience derives from the same doctrine that underlies the exercise of judicial review.

It is established that any individual who believes an ordinance or a law to be unjustified may break it deliberately for the purpose of testing its validity. This commonly happens in tax cases. However, this kind of civil disobedience is really little more than an acceptable legal tactic rather than a positively protected constitutional right of civil disobedience because the person who adopts such a tactic must pay the penalty for breaking the law in the event his challenge is not upheld by the courts. But what is the constitutional theory upon which such a tactic is based?

Let us take a different type of case involving a restaurant sit-in to enforce the right of Negroes to be served in public places. Those making the challenge know that the discriminatory restaurant practices are legalized by local ordinances. This means that a sit-in violates local trespass laws. The prohibition of trespass is not unconstitutional and therefore civil disobedience involving trespass is not as such protected by the Constitution unless it can be validated by reference to a higher principle of constitutional law. So, at the time of their civil disobedience the demonstrators know their acts are technically punishable even

128. See pts. I & III *supra*.

though they calculate and hope that the courts will later rule in their favor. But how can the courts do so? The law is settled. The Constitution is known. It was in operation before the demonstrators engaged in civil disobedience and under the Constitution they merit punishment for trespass. So how can they possibly expect to win their case?

The answer is that they know, and everyone knows, that in theory the Constitution is not settled and static. Rather, it is an evolving and emergent Constitution. Only on the basis of this proposition do such acts of civil disobedience become rational, for any act of civil disobedience grounded in sound constitutional theory rather than established constitutional law may later be validated by the courts. That is, the courts may later discover that the temporal Constitution to the contrary, the "true" or "emergent" Constitution actually protects behavior previously punishable at law. It follows in constitutional theory that in such a case the so-called acts of civil disobedience were never really unlawful at all. They always should have been constitutionally protected even though nobody previously knew this to be so. Those civil disobeyors who made the successful challenge were actually, in theory, behaving constitutionally all along. Moreover, what is most important, constitutional theory holds this may have been the case *even if the courts had ruled the other way* and upheld the local ordinances and trespass convictions.

Inasmuch as the Supreme Court cannot deliver advisory opinions and state in advance how they would rule if a hypothetical case were to be brought, there is no way for citizens to know in advance which acts of civil disobedience later will be found to have been legitimate demands for the enjoyment of constitutionally protected rights. Therefore it follows in principle that *all* who engage in such civilly disobedient challenges of existing law, those who "lose" as well as those who "win," can be said to be acting under the same general principle of constitutional *theory*, namely that their allegiance, like all citizens' allegiance, is to the nation's "true" or "emergent" Constitution of the future as well as to the transitory, fallible constitution of the present. That is, their allegiance, like that of ante-bellum Americans, is dual. On one side it is to the temporal, but transitory, Constitution; on the other side it is to the developing contours of the "higher" law. It is this latter side of their allegiance that protesters implicitly invoke when they engage in civil disobedience. And demonstrators are not alone. All people who live under such a Constitution must be presumed to acknowledge allegiance to the emergent as well as the temporal Constitution.

It follows that the constitutional theory that protects the *a priori* presumption of the legitimacy of civil disobedience should be accorded explicit recognition at constitutional law. That is, constitutional protection for acts of civil disobedience should be extended *in principle* to cover cases that might lose as well as those that might win, for such protection is essential to the maintenance of the working principles of an evolving constitutional order. This is required in theory in order to maintain the practice whereby the principles of the emergent constitution are revealed through judicial review. *Civil disobedience, therefore, acquires the presumption of constitutional protection as a concomitant of the principle of judicial review.* It also follows that teaching and advocating civil disobedience to others is protected. This is the general statement of the basis for the constitutional theory of civil disobedience and of the way that general theory might find recognition as a principle of constitutional law by adding together (1) the Bill of Rights, (2) judicial review, and (3) the necessary and proper implications of an emergent Constitution.

But how might one draw the line between protected and unprotected disobedience? Obviously, not all violations of law can claim protection under the above civil disobedience rule. One cannot commit murder or other acts of violence. The first amendment protects "peaceable" assembly. Here the principles developed under the clear and present danger test come into play: first amendment freedoms, and hence civil disobedience, must be upheld unless doing so would present a clear and present danger to the maintenance of civic order. Moreover, it seems proper to insist upon premeditation; there should be evidence of a prior intent to mount a deliberate challenge to a specific governmental law or action. This does not mean all demonstrations and protests would automatically acquire protection. There should be a direct relationship between the act engaged in and the law or practice objected to. Moreover, the action should have the character of a petition for the redress of wrongs. One cannot halt all the traffic over the Golden Gate bridge because one disapproves of an unjust war. Here another established body of precedents comes into play. These are the cases establishing picketing as free speech. Once picketing was illegal.¹²⁹ When it acquired protection as an exercise of free speech, certain standards were required. It had to be non-violent.¹³⁰ It had

129. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 436 (1970); Hellerstein, *Picketing Legislation and the Courts*, 10 N.C.L. REV. 158 (1932).

130. See *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292-95 (1941).

to have a direct relation to the grievance complained of.¹³¹ Similar general principles could apply to the exercise of the constitutional right to civil disobedience. The right to petition a private party for the redress of grievances, as in a trespass case, cannot be given firmer protection than the right to petition one's own government.

Obviously these criteria would be difficult to apply. They would involve the courts in "balancing" tests and these are less than satisfactory. But if the above argument is sound, these tests should be applied in the light of the *a priori* assumption of the constitutionality of civil disobedience.

How does this improve on the present situation which rests upon the Court's interpretation of the Bill of Rights? The answer is that it properly situates the presumption of the constitutionality of civil disobedience. This helps remove a special group of liberties relating to direct action from dependency upon the fleeting majorities of Supreme Court justices. The proposition that the explicit acknowledgment that civil disobedience is of the essence of constitutionalism is derived from an argument similar to that Jefferson and others made against Hamilton when he opposed making the Bill of Rights a part of the Constitution. Hamilton claimed all their provisions were *implicit* in the way the provisions in the main body of the Constitution were constructed. The libertarians replied that unless the specific rights were explicitly included persons other than Hamilton might not realize they were incorporated implicitly in the body of the Constitution, or that others might disagree, and if so there would be no recourse. The argument against Hamilton also applies to the argument today that there should be explicit acknowledgment of the constitutional right to civil disobedience.

The primary objection against the foregoing doctrine is that its observance might undermine law and order and thus destroy the fabric of society. The imagination conjures up all sorts of nightmarish visions of widespread civil disorder. People, it is feared, would feel released from their normal sense of obligation to obey the law. Like children released from school, they would rush to an orgy of violence. The specter of anarchy, which preoccupies the conservative as much as does sex the puritan, seems to place an indelible hex on the idea of constitutional protection for civil disobedience. But such fears have little substance.

131. See *International Bhd. of Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957).

In the first place, it is not strict application of the law and fear of the police that induces public tranquility. Rather, the entire network of social and cultural mores, more than the formal provisions of the law, is what constrains most people from deviant behavior. Such forces are not going to be overruled by the recognition of the constitutional right to civil disobedience.

The type of person who is so concerned as to make a moral and constitutional stand on any important issue, against the law or against the mores of the time, is so rare that fear of prospective anarchy deserves scant credence. Put it another way: if deviant and disobedient behavior in actual practice were to become as widespread as this constitutionally protected right theoretically might permit it to become—and thereby truly injure the fabric of society, bringing the maintenance of law and order to an end—then that would also constitute proof that the society no longer deserved the support of its people. The free and protected exercise of the right to civil disobedience would thus furnish a democracy with the best possible index of the consent of the people and the maintenance of the principles of justice.

So far so good. There should be an *a priori* presumption in favor of the constitutionality of direct action and this is required because of the indissoluble tie between constitutionalism and civil disobedience. However, this deals only with legal presumptions and principles of constitutional construction. But it does not go to the heart of the matter which is the *institutionalization* of civil disobedience—and beyond that, institutionalization in such a way as to do for mass democracy what earlier forms of institutionalized civil disobedience did for oligarchical republics.

C. Conclusion

The foregoing doctrine could be implemented without institutional innovation. It stands as a principle of constitutionalism requiring no more than recognition and enunciation. But however salutary its adoption might be, it fails to institutionalize a ready ability to dislodge a corrupt or discredited administration. While the following recommendation may not provide this capacity directly it does furnish an autonomous power base for the maintenance of an informed and alert electorate: a new kind of institutionalized civil disobedience which could become an effective counter-force against a disreputable administration. Recall that it was a combination of intensified public information about Vietnam and concerted mass opposition that forced the retirement of

Lyndon Johnson. Although this was an ad hoc response that could not be relied upon to reassert itself automatically as needed in the future, the institutionalization of similar ad hoc responses led to the ultimate emergence of the conventions of the British Constitution. A comparable development might grow out of the recent experiences of Americans. Two components are involved. The first is educational; the second is structural. This was Jefferson's approach to constitutionalism in a democratic republic and his lead bears following up on today.

Jefferson came to believe that federalism, public education and his newly invented political party might enable the people to safeguard their freedoms. In order for the people to possess the authority to control their government the States had to remain effective. But the two ingredients of popular control—political power and education—could only be brought to bear on the national government through the new-model political party that deposed the Hamiltonians and put Jefferson in the presidency.

In Jefferson's day a high school level of education was sufficient to enable the people to detect and understand the critical issues of the day. In our own day a considerably higher level is required. As many of our contemporary commentators have pointed out, our chief problems, are systemic, and their solutions are counter-intuitive and confound our ordinary understanding. To apply Jefferson's maxim today requires bringing our entire voting age population up to the level of a college education.

Despite our traditional democratic educational creed we have never addressed ourselves effectively to the realization of the goal of providing high cultural status for all adults. To do so will require a major political and institutional innovation. The most promising answer to this problem appears to be provided in our new educational cities such as Reston and MXC, in Minnesota, designed around their educational institutions.

Let us put the question differently: If we were to seek for new ways of institutionalizing mass civil disobedience today, what might we do under present conditions? This is the question that Ralf Dahrendorf addressed in a different way in the 1974 Reith Lectures.¹³² He announced the need for an "agenda for recovering public control and individual rights from bureaucracies," while preserving the services they provide. This he identified as "one of the primary tasks of a search

132. Dahrendorf, *Justice Without Bondage*, 92 THE LISTENER 692-94 (Nov. 28, 1974).

for a new liberty." Dahrendorf lamented the "alienation of enlightenment," which he attributed to the bureaucratic rigidities of contemporary industrial societies: "The idea that man should participate in the social, economic and political process as a citizen . . .," he argued, is "one of the revolutionary advances of the expanding society."¹³³ Dahrendorf, in 1965, had introduced into German politics the proposition that education is a civil right. He called for "an active policy of full citizenship. . . . For the new liberty," he claimed, "will not be won unless every citizen is given access to the varied universe of life-chances in a complex society."¹³⁴ This, he argued, calls for "the revolt of the individual against the ossification of reality." This is not a simple task because representative democracy has compounded the difficulty and produced "a new authoritarianism in the cloak of participation. . . . The equality party has had its day, and the task today is to develop the full potential of a new liberty."¹³⁵ Dahrendorf, confronting contemporary centralization, has sounded a Jeffersonian refrain: high educational status for the people plus the disaggregation of bureaucratic power. But how to make this new force politically effective?

Recent years have witnessed a quest for a new form of grass roots participational democracy; one that would be as applicable to an urban civilization as were our previous democratic forms to rural conditions: a new form of participation capable of bringing democracy to our city streets. The establishment of *a priori* constitutional protection for civil disobedience might open the door to a new participational democracy of the streets, but how would it be institutionalized? Through the established party system?

At first, in the early 19th century, there was a possibility that the newly invented Jeffersonian political party might have provided the proper foundation. Developments since then have frustrated that hope. Today, social critics are already writing about the dawn of a "post-party" form of democracy.

It was in the United States, not Europe, that the modern mass political party first appeared. It grew out of the innovations of the Jefferson-Jackson period and the inter-sectional crisis that soon after began to unfold. Much later the two party system emerged. In the eyes of many political scientists the two party system was virtually identical with democracy itself. The later tendency was to visit this intent upon the

133. *Id.* at 693.

134. *Id.*

135. *Id.* at 694.

Jeffersonians. That was far from what Jefferson had in mind. "Party," at that time meant a legislative faction and its outside supporters. The prime example was the English Parliament, and the parliamentary factional parties of 18th century England was exactly what Jefferson wished to avoid. He believed instead that the people ought to be the repositories for the authority to control their government and this might be accomplished if they could be organized in a non-party political system based on the states. Inter-party competition was the thing to be avoided, not the goal to be sought. Moreover, he was sensible to the force of our contemporary allegations that representative institutions produce political alienation by separating the people from the exercise of power. Hence his concentration upon grass roots democracy. Not raw mass power but federally institutionalized popular power.

Now we begin to perceive a way of reviving the institutionalized civil disobedience that died with the atrophy of federalism after the Civil War.

Federalism has always meant decentralized organization in which the component units have a territorial base. However, there are other ways of utilizing the same principle. One is to base organization on functioning units such as industries and professions, or on policy areas such as economics or science. Various forms of corporativism have done this, the most familiar being that now operating in Yugoslavia. Indeed, something like the Yugoslav scheme may be necessary to bring stagflation under control for such a device might make it feasible to organize the economy on a political basis. Representatives of local economic councils could meet in a national economic parliament where they would be capable of taking responsibility for allocating capital investment and insuring the equitable distribution of income shares.

Functional federalism would also make it possible to guarantee the autonomy of the basic functioning components of the society, giving them a status consonant with the doctrine of subsidiarity. This is a principle of decentralization whereby the component parts of an organization resolve on their own all issues they can; it is something like the appellate jurisdiction of court systems. Nothing is done at the higher levels of organization unless absolutely necessary. On such a basis many of the propositions that John C. Calhoun advocated concerning territorial federalism could be adapted to functional federalism.

Here we would be thinking of our new cities as functional communities and "publics"; true community republics. Their concerns would be general rather than limited solely to economic or administrative is-

sues. This implies that such community Republics, possessing autonomy and protected under the constitutional theory of the institutionalization of civil disobedience, could function as the primary building blocks of a democratic society. The pioneering measures of the new community republics could then serve as models for the reconstitution of the older cities. Jeffersonian democracy could acquire renewed meaning.

How would our present system of competing parties fit into this proposal? Possibly not at all. There would be no more need of competing parties than there is for the election of vestrymen in a church. However, it is true that some way of giving a national focus to these community republics could be needed. This points to a theoretical issue that arose earlier; the problem that John Locke solved through the device of two contracts—the prior contract of society and the subordinate contract of government—and that the infant republic solved through federalism, so long as it remained constitutionally vital.

The whole point of institutionalizing civil disobedience is to provide for the primacy of popular forces vis-à-vis the government, should the latter misbehave: hence the need to derive a national community of communities out of the component community republics. While competing political parties could be continued for the filling of federal offices they would be unnecessary in the new national community of communities, for it would stand over against the deliberative institutions of the federal government. The authority for this derives not only from John Locke but also from the Preamble to the Constitution: "We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America."